

**LABOUR RELATIONS BOARD
Saskatchewan**

**CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 21, Applicant v. CITY OF REGINA and REGINA CIVIC MIDDLE MANAGEMENT ASSOCIATION, Respondents
- and -**

CITY OF REGINA, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 21 and REGINA CIVIC MIDDLE MANAGEMENT ASSOCIATION, Respondents

LRB File Nos. 103-04 & 222-04; July 26, 2005

Vice-Chairperson, Angela Zborosky; Members: Patricia Gallagher and Leo Lancaster

For CUPE, Local 21:	Malcolm Matheson
For the Employer:	Gail Wartman
For RCMMA:	Ralph Ottenbreit, Q.C.

Unfair labour practice – Duty to bargain in good faith – Refusal to bargain – Employer did not obtain agreement of bargaining representatives or order of Board before unilaterally assigning new positions to one bargaining unit – Employer violated obligation to bargain collectively under s. 11(1)(c) of *The Trade Union Act*.

Bargaining unit – Appropriate bargaining unit – Managerial exclusion – Superintendents do not fundamentally affect economic lives of fellow employees such that inclusion in bargaining unit would be incompatible with collective bargaining - Duties and responsibilities actually exercised by superintendents not sufficiently managerial to create insoluble conflict with in-scope employees – Superintendents are employees under *The Trade Union Act*.

Bargaining unit – Appropriate bargaining unit – Board policy – Middle management unit - Board reviews approach to use in assigning employee position in this multiple bargaining unit setting - Positions belong in broader, more inclusive bargaining unit unless conflict of interest exists with members of broader, more inclusive bargaining unit or broader community of interest or historical anomaly mandates placement outside broader, more inclusive unit.

Bargaining unit – Appropriate bargaining unit – Community of interest – Board looks at educational qualifications, general nature of duties performed, lateral mobility and similarity of positions at issue with positions in each competing bargaining unit – Superintendents assigned to broader, more inclusive bargaining unit.

***The Trade Union Act*, ss. 2(f), 5(m), 5.2 and 11(1)(c).**

REASONS FOR DECISION

Background:

[1] Canadian Union of Public Employees, Local 21 ("CUPE") made an unfair labour practice application (LRB File No. 103-04) against the City of Regina (the "City") alleging that the City violated s. 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act") by creating two new positions, superintendent of asphalt and superintendent of concrete and assigning these positions to the Regina Civic Middle Management Association ("RCMMA") bargaining unit, without negotiating the removal of these positions from the CUPE bargaining unit or obtaining an order of the Board assigning these positions to the RCMMA bargaining unit.

[2] In its reply to the unfair labour practice application, the City asserted that the positions in question were not removed from the CUPE bargaining unit but were created following a reorganization which resulted in four supervisor positions, belonging to the CUPE bargaining unit, being deleted, two new superintendent positions being assigned to the RCMMA bargaining unit and two new assistant superintendent positions being assigned to the CUPE bargaining unit. The City asserts that the assignments were made after a full review of the nature of the positions relative to their managerial responsibilities and after consideration of past practice and the RCMMA certification Order.

[3] RCMMA also filed a reply to the application asserting that the superintendent positions are appropriately assigned to its bargaining unit and they do not resemble any positions previously in the CUPE bargaining unit.

[4] The unfair labour practice application came before the Board for a hearing and, following discussions with the parties, it became apparent that an important issue to the parties was a determination of the appropriate placement of the superintendent positions. The hearing was adjourned to allow the City to bring an application pursuant to s. 5(m) of the *Act*.

[5] The City filed an application on September 3, 2004 (LRB File No. 222-04) pursuant to ss. 5(m) and (j) seeking an order declaring that the two superintendent positions were not employees within the meaning of s. 2(f) of the *Act* and should properly be placed outside of the scope of both the RCMMA and CUPE bargaining units. Alternatively, the City seeks a determination of whether the two superintendent positions should be placed in the RCMMA bargaining unit or the CUPE bargaining unit.

[6] CUPE filed a reply to the City's application asserting that the two superintendent positions are not out-of-scope positions and should be placed in the CUPE bargaining unit. It was the position of CUPE that the four supervisor positions were deleted and replaced by two superintendent positions and two assistant superintendent positions, the latter of which remained in the CUPE bargaining unit. CUPE asserted that the duties of the two superintendent positions have not been sufficiently altered to justify their removal from the CUPE bargaining unit and that the CUPE bargaining unit currently includes positions of similar responsibility.

[7] RCMMA also filed a reply to the City's application and asserted that the newly created superintendent positions are not out-of-scope and that they have been appropriately placed in the RCMMA bargaining unit on the basis that their duties and responsibilities, qualifications, knowledge and abilities are similar to positions currently in the RCMMA bargaining unit and that the employees in the superintendent positions share a community of interest with other members of RCMMA.

[8] The applications were heard on January 17 and 18 and March 14 and 15, 2005.

[9] On March 24, 2005, the Board issued an Order finding that the City had violated s. 11(1)(c) of the *Act* and indicated that reasons for its decision would follow. These Reasons for Decision include those reasons as well as the Board's findings in relation to the City's application for determination.

Certification Orders:

[10] The certification Order issued to CUPE with respect to the City is contained in LRB File No. 547-81 dated April 3, 1982 and reads, in part, as follows:

Determining that all employees (whether temporary, casual or otherwise whatsoever) employed by the City of Regina in the various Divisions or Sub-divisions or Branches of the Parks and Recreation Department, Public Works and Engineering Department and Purchasing Department except:

Parks and Recreation Department

*Superintendent of Parks;
Director of Parks and Recreation;
Superintendent of Recreation;
Administrative Assistants;
All other employees of the Parks and Recreation Department who are certified by the City Hall Administrative Staff Union, Local 7, of the Canadian Union of Public Employees and the Regina Civic Middle Management Association;*

Public Works and Engineering Department

*Director of Public Works and Engineering;
Assistant Directors of Public Works and Engineering;
Administrative Assistant;
All other employees of the Public Works and Engineering Department who are certified by the City Hall Administrative Staff Union, Local 7, of the Canadian Union of Public Employees and the Regina Civic Middle Management Association;*

Purchasing Department

*Director of Purchasing;
Assistant Director of Purchasing;
All other employees of the Purchasing Department who are certified by the City Hall Administrative Staff Union, Local 7, of the Canadian Union of Public Employees and the Regina Civic Middle Management Association;*

are an appropriate unit of employees for the purpose of bargaining collectively;

[11] The most recent certification Order issued to RCMMA, which is dated May 2, 1990, contains, in part, the following:

determining that all employees of the City of Regina, in the Province of Saskatchewan, employed in the following Departments: Assessment and Taxation, Budget, Central Services, City Clerk's, City Manager's, City Solicitor's,]City Treasurer's, Community Services and Parks and Recreation, Corporate Policy and Strategic Planning, Economic Development, Facilities, Fire Services, Fleet Management and Material Supply, General Administration Services, Health, Human Resources, Information Systems, Municipal Engineering, Pension and Benefits, Properties, Public Affairs, Public Works, Purchasing, Rail Engineering, Revenue and Fiscal Services, Transit and Urban Planning, except:

[list of excluded positions by department]

and excepting all other employees in the said Departments who are appropriately members of the following:

- *City Hall Administrative Staff Union, Local 7, of the Canadian Union of Public Employees;*
- *Civic Employees' Union, Local 21, of the Canadian Union of Public Employees;*
- *Amalgamated Transit Union, Local 588;*
- *Regina Professional Firefighters Association , Local No. 181,*

are an appropriate unit of employees for the purpose of bargaining collectively;

Preliminary Matters:

[12] At the commencement of the hearing of this matter, counsel for RCMMA made a preliminary motion arguing that the City should not be permitted to take an inconsistent position in the unfair labour practice application and its application for determination under ss. 5(m) and (j). In the unfair labour practice application brought by CUPE, the City took the position that it had properly placed the positions in question in the RCMMA bargaining unit, however, in its application for determination, the City

asserted that the positions should more appropriately be placed out-of-scope, contrary to what it actually did and the position that it took in the unfair labour practice application. The City responded that, upon its further review of the positions, the positions would be more appropriately placed out-of-scope. Essentially the City was requesting that its reply to CUPE's unfair labour practice application be amended to include this position as an alternative.

[13] The Board determined in a preliminary way that the matters raised by the pleadings placed the proper issue before the Board and directed the parties to continue with the evidence on the main applications, permitting the City to take either position at the hearing in relation to both applications, and reserved its decision on the preliminary matter raised by RCMMA.

Facts:

[14] These applications arose out of a restructuring at the City in a number of divisions in the engineering and works department and in particular, for the purposes of this application, the roadways and traffic division. The roadways and traffic division is headed by the general manager of roadways and traffic services, an out-of-scope position, to whom several out-of-scope managers from a number of sections report, including the manager, roadways operations. It is in this section, the level below the roadways operations manager, where the changes occurred on April 23, 2003 that gave rise to these applications. Under the prior structure, there were four supervisor positions in this section, all within the scope of the CUPE bargaining unit, reporting to the manager, roadways operations. They were: supervisor asphalt construction, supervisor asphalt maintenance, supervisor concrete construction and supervisor concrete maintenance. Reporting to each of these supervisors were foremen, crew leads and operators/labourers, all of whom were in the CUPE bargaining unit. The City restructured the section by combining asphalt construction and asphalt maintenance into an "asphalt" work area and concrete construction and concrete maintenance into a "concrete" work area. The changes brought about by the restructuring involved the elimination of the supervisor positions and the creation of four new positions. In the asphalt work area, the superintendent of asphalt and the assistant superintendent of

asphalt report to the manager of roadways operations. In the concrete work area the superintendent of concrete and the assistant superintendent of concrete also report to the manager of roadways operations. The City assigned the superintendent positions to the RCMMA bargaining unit while the assistant superintendents were assigned to the CUPE bargaining unit. The foremen, crew leads, operators and labourers of the prior four work areas were brought together under each of the two new work areas and all remained members of the CUPE bargaining unit.

[15] Following the restructuring, Shane Simpson (formerly the supervisor of asphalt construction) was appointed to the position of superintendent of asphalt, Ken Kovatch (formerly the supervisor of concrete construction) was appointed to the position of superintendent of concrete, while the remaining two supervisors were appointed to the positions assistant superintendent of asphalt (Pat Reilly) and assistant superintendent of concrete (Jim Schweitzer). When Mr. Simpson left employment with the City approximately eight months after the restructuring, Kevin Faul replaced him as the superintendent of asphalt.

[16] There were also changes to management assignments following the restructuring. Bob Forbes, the previous manager of roadways operations was transferred to the position of manager of roadways performance and maintenance standards while Carlyle Murray, previously the roadways operations engineer, became the manager of roadways operations.

[17] The only disputed positions that are the subject of this application are the superintendents. While the City assigned them to the RCMMA unit at the time they were created, the City now maintains that the superintendent positions should be out-of-scope. RCMMA takes the position that the positions should be placed in its bargaining unit while CUPE maintains that the superintendent positions are no different than the former supervisor positions and therefore should remain in the CUPE bargaining unit.

[18] The process through which the City assigned the newly created positions to the RCMMA and CUPE bargaining units is the subject of the unfair labour practice

application brought by CUPE. In a without prejudice letter to CUPE and RCMMA dated May 12, 2003, the City outlined the restructuring plan and the positions affected thereby. At the outset of the letter the City stated: "All position descriptions that are affected by the restructuring will be prepared and reviewed by the respective Joint Union Management Job Evaluation Committees for determination of classification." In this letter, the City advised of the deletion of the four supervisor positions and their replacement by the superintendent of asphalt and the superintendent of concrete. The City indicated that, as per their conversation of April 9, 2003, the superintendent positions would be assigned to the RCMMA bargaining unit and further indicated that two of the current supervisors would be assigned to the two assistant superintendent positions and the two superintendent positions would be posted. Regarding the superintendent and assistant superintendent positions the City indicated that "the qualifications of all the supervisory positions will incorporate significant expectations of supervisory skill development," that the department was identifying a training package and that employees would be expected to meet the qualifications after being given an opportunity to attain the same. The letter indicated that job descriptions would be completed soon.

[19] CUPE's witness, Alex Lenko, acting president of the local at that time, stated that this was the first time that CUPE was informed that the position would no longer remain in its bargaining unit. Mr. Lenko referenced a meeting held earlier in the spring of 2003 with management personnel at which time CUPE was advised of the restructuring plan and that the new superintendent positions would remain within the CUPE bargaining unit. Mr. Lenko also referred to a meeting held with management, pre-dating the May 12, 2003 letter, at which time CUPE was advised that the positions would be posted in the RCMMA bargaining unit.

[20] On May 21, 2003 the City sent a letter to all of the unions representing employees at the City which indicated that the two new positions of superintendent of concrete and superintendent of asphalt had been classified as RCMMA positions and that they would be posted and filled accordingly. Following the restructuring, Mr. Lenko indicated that the incumbents in the superintendent positions contacted CUPE and

advised that the work they were performing and the responsibilities they exercised were no different than in their prior supervisor positions. CUPE filed a grievance over the creation of the positions and their assignment to RCMMA's bargaining unit. Mr. Lenko testified that CUPE first proceeded to discuss the scope issue through "committees to be heard" which is an informal process outlined in the collective agreement. Not having obtained a satisfactory resolution, CUPE proceeded to the first stage of the grievance procedure however the City would not deal with it at this stage, believing that the grievance was improperly filed. CUPE therefore proceeded to the second stage of the grievance procedure which involved a meeting with the city manager. It was Mr. Lenko's evidence that the city manager did not believe it was a proper grievance but proceeded to meet with CUPE in any event.

[21] On August 28, 2003, the city manager, on behalf of the City, wrote to CUPE in response to the meeting held between them on July 23, 2003 regarding CUPE's concerns over the placement of the superintendent positions in the RCMMA bargaining unit. In that letter the City stated that: "... the employer, has the right to create new classifications or to alter existing job classifications subject to the specific requirements of the Collective Agreement." The City stated that it made its decision based on a consideration of the expected managerial role of the positions (i.e. taking corrective discipline and representing management at grievance proceedings) and the bargaining unit with which the incumbents would have a community of interest. The City began its analysis with considering whether the positions belonged in CUPE by reference to the definition of "appropriate unit" in the *Act*, and then examined, by reference to the RCMMA certification Order, whether the positions appropriately belonged in that unit.

[22] CUPE, noting that the city manager was responding to its grievance meeting instead as a "committee to be heard," found the City's response to be unsatisfactory. CUPE had a few more meetings with the City over the next several months but, as the grievance had basically "died," CUPE decided in May of 2004 to file the unfair labour practice application. Mr. Lenko testified that at no time did the City approach CUPE to negotiate regarding the superintendent positions.

[23] Dorian Wandzura testified on behalf of the City. Mr. Wandzura was very recently appointed to the position of general manager of sewer, water and waste management in the engineering and works department although at the relevant time he held the position of general manager of roadways and traffic and was instrumental in planning and effecting the restructuring of 2003. During CUPE's cross-examination of Mr. Wandzura, he acknowledged that the City had unilaterally placed the superintendent positions in the RCMMA bargaining unit after being told by the City's human resources department that it could do so without discussing with or obtaining the agreement of CUPE. Mr. Wandzura was also questioned by counsel for RCMMA concerning the change in the position of the City, that is, having placed the superintendent positions in RCMMA, the City then wanted them to be declared out-of-scope. Mr. Wandzura was specifically asked why, after placing the positions in the RCMMA bargaining unit at the time of their creation in May 2003 and maintaining that the positions belonged in RCMMA during the course of CUPE's grievance procedure and the swearing of a statutory declaration in reply to CUPE's unfair labour practice application in May 2004, would the City suddenly swear in another statutory declaration, that being its s. 5(m) application, that the positions now belong out-of-scope. Mr. Wandzura responded that, while careful consideration had been given to the initial placement of the positions in the RCMMA bargaining unit, prior to the s. 5(m) application being made the City recognized RCMMA as a *bona fide* trade union not just a professional association or social club and that, after looking at the definition of "employee" in the *Act*, the City decided that the position descriptions fell out of the scope of both bargaining units.

[24] Lisa Legault, president of RCMMA testified on its behalf. She indicated that RCMMA only learned of the City's position to place the positions out-of-scope at the time the City filed its s. 5(m) application. She believes that the positions meet the criteria for placement in RCMMA because they have management functions, have their authority delegated by senior management and they supervise a specific work unit.

[25] Mr. Wandzura provided an overview of the restructuring that occurred in the engineering and works department and specifically the roadways operations division. He described the work of the division as varied including street sweeping, pot hole

repair, capital construction, concrete repair, erection of snow fences, snow plowing and removal, and ensuring catch basins are open and water is draining properly. He viewed the area as a diverse one and, while cyclical in nature, it could change quickly in response to weather conditions or emergencies. He testified that the restructuring came about as a result of a disconnect between engineering, capital planning and maintenance. In the roadways operations section, he noticed that there were four different supervisors delivering the same program in different ways. The City wanted to set standards for service delivery and to bring all the areas together to create what he referred to as “our construction business.”

[26] In examining the roadways operations section Mr. Wandzura noticed that there was a very low management to staff ratio and that important decisions such as how to operate, manage employees and implement change were being performed by the in-scope supervisors. Although Mr. Wandzura acknowledged that he had only been at the City for approximately six months before he began to plan the restructuring, he stated that he observed that the front-line staff was continually being asked to operate at a high level, making staff and resource allocation decisions. Mr. Wandzura also noticed that there were competing priorities in each of the four areas, each with their own mandate. It was therefore necessary, in his view, to address the problem of competing priorities by combining the four areas into two and eliminating the four supervisor positions and creating two superintendent positions in their place. Ultimately the goal of the restructuring was to achieve consistent performance standards on an operational basis and to have better managed policies and programs. With this in mind, Mr. Wandzura canvassed the City for a comparable job description for the new superintendents and came up with the position of superintendent of open space services as comparable. He stated that the position description for the superintendent is very similar to that position description.

[27] In CUPE’s evidence it was observed that what appeared to have resulted from the restructuring was not necessarily a unification of the prior branches but rather it was an attempt to eliminate the conflict and indecision that resulted from having four supervisors, of the same level, competing for resources in order to meet the priorities of

their respective work areas. The restructuring allowed there to be one person (either the superintendent of asphalt or the superintendent of concrete) making all of the decisions for construction and maintenance in his or her work area, thereby leading to greater efficiencies and a more effective utilization of equipment for which the prior four work areas competed.

[28] The evidence presented by the parties at the hearing tended to show that the City's plans for the new superintendent positions may have been somewhat different than what actually occurred, at least by the time that this hearing was held. As part of its rationale for placing the positions in the RCMMA bargaining unit, the city manager in his August 28, 2003 letter to CUPE stated that: "the employer had identified a need for creating a linkage with senior management in making these Superintendents integral contributors to the management team" indicating that the need arose for more direct and strategic influence on planning. The City felt that the supervisory personnel were not sufficiently focused on long term planning, instead focusing more on day-to-day operations. It was the expectation of the City that these Superintendents, "with aggressive training proopsed [sic] for the Division will be expected to contribute to the Division's long term plan and to provide stability, training plans and co-ordination to the overall workforce." The City also expected that the two superintendent positions would collectively be responsible for 160 employees (80 permanent and 80 summer casual) and a fifteen million dollar budget for maintenance and capital projects. Mr. Wandzura acknowledged that the supervisors were performing managerial functions but indicated that the City intended to build on that by broadening the functioning of the superintendents. He saw the responsibilities of the superintendents as having the ability to effect change and the power to do so through the elimination of the conflict that existed in the prior structure. The City had wanted more front-line leadership at the operations end of the business however Mr. Wandzura acknowledged that it was important that the ones making the decisions (the superintendents) be the ones actually performing the work, because the managers were too far removed from the actual operations. The superintendents were expected to be responsible for decision making and to be held accountable for those decisions. Mr. Wandzura viewed the change as one from managing crew and projects as a supervisor to managing people and making

decisions as a superintendent. Throughout the course of the examination of the superintendent positions, Mr. Wandzura continuously made reference to the fact that the changes to the positions, reflected in the job descriptions, would be gradual and that it would take some time before the incumbents were fulfilling the vision of the City for the positions.

[29] CUPE's position and the evidence it led in support of that position, attempted to establish that the employees in the superintendent positions performed the same duties and had the same responsibilities as the employees in the previous supervisor positions (in CUPE's bargaining unit), although they were now responsible for both maintenance and construction in their branch instead of just one or the other. CUPE also led evidence concerning other positions, in particular the supervisor of sewage collection (a CUPE position) in an attempt to establish that that the duties of that position are the same as the prior supervisor positions in question and the new superintendent positions.

[30] As much of the evidence led at the hearing made reference to the purpose and the duties and responsibilities stated in the job description for the superintendent of asphalt (which is the same as the superintendent of concrete) it is perhaps useful to repeat that part of the job description in its entirety:

PURPOSE:

In an environment that supports continuous improvement and under the general supervision of the Roadways Operations Manager, this employee applies leadership and management skills in planning developing and maintaining services of a comprehensive asphalt program for the City's surface infrastructure.

DUTIES AND RESPONSIBILITIES:

Prepares monitors and controls capital, revenue and operating budgets under his/her control.

Recommends and carries out approved policies and practices related to the safe, effective and cost efficient operation of the section.

Recommends and implements changes and improvements in construction and maintenance procedures, material requirements, equipment utilization, staffing levels and work schedules so as to ensure optimum effectiveness and efficiency.

Takes the necessary action to prevent loss and waste of assets and overtime expenditures.

Participates on the Section Management Team representing the section and acting as a resource to the Team on relevant matters.

Supervises and organizes a workforce engaged in the performance of tasks relating to the construction and maintenance of paved or gravel streets, roads, alleys and miscellaneous asphalt related projects.

Plans, directs, monitors and evaluates the work activities of the section, in accordance with standard methods and procedures.

Determines and develops staff training and development programs to ensure personnel remain abreast of new methods, products and technological changes.

Submits confidential reports concerning employee problems and grievances, and deals with employee complaints and grievances giving evidence when required on behalf of the City at formal hearings of boards and/or committees.

Represents management at grievance proceedings and attempts to resolve conflict and union related problems at assigned level of responsibility.

Interview and recommends staff selection; prepares subordinate staff appraisals and recommends appropriate measures, including corrective discipline.

Approves requisitions, expenditures and other transactions within the limits of established authority.

Prepares and maintains long and short term construction and maintenance plans.

Leads staff within established priorities, standards and procedures and within financial controls.

Receives and responds to complaints and inquiries from the public, other departments and elected officials and the media.

Prepares and presents reports, correspondence and briefs as directed by the Roadways Operations Manager, maintains all records and statistics related to the section.

Organizes and directs the winter maintenance of streets, roads, alleys and walks including snow plowing, snow removal and sanding of streets and walks.

Maintains inventory for parts, replacement of units, tools, special equipment and materials pertaining to the division.

Specifies material requirements, reviews design plans, assists in setting contract specifications and makes tender recommendations.

Interprets specifications, blueprints, diagrams and work orders to subordinate foremen, crewleads and engineering assistants to ensure that work is performed in accordance with prescribed procedures and methods.

Confers with owners of other underground utilities such as gas, power and telephone companies prior to any maintenance or construction work.

Implements established occupational health and safety programs with the section.

Participate on various departmental committees as assigned. (ie: OH & S, staff development etc.)

Follows all rules and regulations as set out in the Provincial Occupational Health and Safety Act and the City of Regina Occupational Health and Safety Manual.

Responds to call-outs to deal with emergency situations and/or direct information to personnel with respect to required action.

Performs related work as required.

...

[31] Job descriptions were also entered for the position of superintendent of concrete, as well as for the four prior supervisor positions in the division. While it is of more import what duties the incumbents actually perform and the responsibilities they actually exercise, a few comments can be made concerning a comparison of the written job descriptions. The superintendent of concrete and the superintendent of asphalt

share exactly the same position description, but for a few minute differences in language because one has the focus of concrete and one of asphalt. The four supervisor positions are also almost identical, except for the position of concrete construction supervisor. For the most part that position reads exactly the same as the other supervisor positions, although there a few additions, the only one of note being that it includes the duty: "Promotes and enforces regulations and policies related to Labour Relations." While the parties did not address the importance of such a distinction, that duty appears to reflect the evidence given regarding the actual performance of a typical supervisor's duties. The Board makes the observation that the inclusion of such a provision in this particular job description only appears unusual given that this job description was last amended in 1994, while the earliest of the supervisor job descriptions was last amended in 1988 and the supervisor of asphalt construction was last amended in March, 2002.

[32] Mr. Wandzura testified on behalf of the City in relation to the expectations of the superintendent positions and provided some examples of where he thought differences existed between the former supervisor positions and the superintendent positions. The City viewed the superintendents as having the ability to make operational and workforce changes to reduce the amount of overtime expenditures as the City had noticed a substantial increase from the early 90's until 2002. Mr. Wandzura did acknowledge that during this time period there had also been a 40% reduction in the number of permanent staff. Mr. Wandzura described the implementation of a new winter shift by the superintendents although in cross-examination it was acknowledged that this idea was initiated by CUPE and negotiated between CUPE and human resources. It was also acknowledged that overtime was reduced following the implementation of the new shift however the amount spent on contractors had increased during the same time period. With respect to discipline, Mr. Wandzura testified that the City wants the superintendents to play a greater role, not just stating the facts at meetings but also interpreting and applying the collective agreement and being accountable for their decisions. Mr. Wandzura acknowledged that he has reviewed a letter of suspension written by a superintendent but he suspects that at least human resources was involved in the issuing of the suspension. It was acknowledged that

superintendents would not be involved in discipline and reference was made in cross-examination that only the director would have the authority to issue a termination. Mr. Wandzura also stated that a superintendent has not yet been required to testify at an arbitration hearing. With respect to their dealings with the public, Mr. Wandzura believes that having two superintendents would eliminate the problem of receiving inconsistent answers from the four supervisors. With respect to budgeting, Mr. Wandzura acknowledged that superintendents have not been involved in the actual preparation of budgets on their own but that they do so in conjunction with management. In other words, they assist as part of a team but have no final say on the budget. Mr. Wandzura indicated that as the superintendent positions develop more, the incumbents will be responsible for preparing budgets, submitting plans and making recommendations concerning re-allocations of resources and that this would put them in conflict with CUPE members because the superintendents would have the ability to affect employees' incomes when limiting overtime opportunities. In relation to his provision of evidence regarding a number of the differences between the supervisor positions and the superintendent positions, Mr. Wandzura made reference to the fact that this is a transition, that the former supervisors appointed to the superintendent positions could not change "overnight" in terms of their thinking and their culture, that they have come a long way (although he could not provide a definitive example of a substantial change that was made) but that, 20 months after the creation of the superintendent positions, more change is required to meet the requirements of the position descriptions or meet an agenda the City is attempting to develop. In relation to the examples given concerning what was or could be accomplished by reason of the changes to the superintendent positions, Mr. Wandzura indicated that change could be brought about by having superintendents bringing the competing objectives together. Mr. Wandzura acknowledged that the supervisors had the necessary authority to make the required changes, even by looking at their job descriptions, but indicated that it was a question in the organization whether there was a will to change or resistance to change.

[33] Shane Simpson testified on behalf of CUPE. While at the time of the hearing he was no longer employed with the City, he had held a number of positions over his 29 year career there, including supervisor of asphalt construction and

superintendent of asphalt just prior to his departure from employment with the City. Mr. Simpson testified about his work experience in both positions, having held the supervisor of asphalt position for one and one half years (as a member of CUPE) and the superintendent of asphalt position for eight months (the disputed position assigned to the RCMMA bargaining unit). Mr. Simpson maintained that the merger of the asphalt maintenance and construction areas did not change the position of supervisor when it became titled "superintendent." The area remained "team-focused" with shared responsibility that was somewhat broader in scale because he was now responsible for maintenance and construction. With the assistance of the City's job descriptions for both positions, he testified that most of the duties he performed as the supervisor of asphalt construction he also performed when he was appointed to the position of superintendent of asphalt and stated that the job description of the supervisor position "expanded a great deal in practice." He continued to report to the roadways operations manager, Carlyle Murray. He believes that the only difference between the positions was that as a superintendent he had a greater number of employees to supervise and he exercised his duties in both construction and maintenance. He also found that he worked more closely with the superintendent of concrete than he had with the other supervisors.

[34] Mr. Simpson closely reviewed the position description for the superintendent position and testified that he believed he was carrying out all or at least most of the listed duties in the prior supervisor position and provided examples to the Board of each of the duties and responsibilities listed in the superintendent job description and how he carried out the same as both a supervisor and as a superintendent. The only duties in the superintendent position which he did not perform in both positions was participation on the section management team, indicating that there was no such team in place either when he was a supervisor or a superintendent; and maintenance of inventory which he stated was not performed in either position, that he ordered items as required. There was little discussion regarding implementation of occupational health and safety programs, or following rules of same.

[35] Tim Haynes also testified on behalf of CUPE. Mr. Haynes was, at the time of the hearing, an engineering assistant IV (with the CUPE bargaining unit)

reporting to the manager of asphalt production and field services, which is another section under the roadways and traffic services division. Mr. Haynes belongs to both the American and Saskatchewan public works associations, holding the position of chair with respect to the latter association. Mr. Haynes provided testimony on the basis of his experience having acted in the positions of superintendent of asphalt (one occasion for three weeks in the summer of 2003), supervisor of asphalt construction (on a few occasions, once for a period of three and one half months, all within the last three years) and supervisor of concrete construction (for a period of five weeks). Mr. Haynes testified that, when he was required to act in any of these positions, he performed all of the duties and responsibilities in the acting position while another employee replaced him in his regular position. Mr. Haynes indicated that, prior to commencing the superintendent position, he reviewed the job description and believes he did exactly what was required of the position. In cross-examination, however, Mr. Haynes acknowledged that, having spent only three weeks in the superintendent position not long after it was created, he would have only a limited view of the position and that, aside from his observations of the incumbent in the position, he would not have direct knowledge of the day-to-day functions of the position since he acted in it. Mr. Haynes did testify that he believed he performed all of the duties and responsibilities listed in the superintendent job description except for the ones related to grievance handling (none arose during his acting position) and that, most certainly, he did perform those listed duties when he acted in the supervisor positions prior to the restructuring. Mr. Haynes had also not been aware of the existence of a section management team, although he was aware that, prior to the restructuring, there were construction meetings held with other supervisors, the manager and the engineer in the roadways operations section. Regarding a few of the duties, Mr. Haynes indicated that they were not performed by the superintendent or supervisor but rather by the foremen (maintaining inventory) or the engineering assistant (i.e. making tender recommendations, writing briefs and reports at the direction of the manager).

[36] In response to the testimony of Mr. Simpson and Mr. Haynes, Kevin Faul testified on behalf of the City. Mr. Faul has held the position of superintendent of asphalt since April, 2004 (following Mr. Simpson's departure from the position). He has held

several positions with the City since 1973, including the supervisor of asphalt construction from 1994 until 2002 when he left the employ of the City to pursue other job opportunities. He also held the position of full-time president of CUPE for one term. Mr. Faul was asked questions concerning the changes to his duties and responsibilities in the superintendent position compared to the supervisor position. He indicated that the primary change was that he was responsible for a larger area, comprising both construction and maintenance, with more staff. He felt that he was given the authority to operate the area as “his business” (subject to the City’s bylaws and policies). He felt there was enhanced accountability with greater responsibility and power. Prior to accepting the position he had raised concerns about the extent of authority he would have, his frustration in his prior supervisor position being one of the reasons he left the City. He had found little support for changes he suggested to his manager at that time, Mr. Forbes. He returned to the employ of the City in the superintendent position in part because he could see that changes were being made and that the City was “in the mood for change.” He also thought the superintendent position would be different than the supervisor position he had held. As an example of how that occurred, Mr. Faul described a decision that was made concerning the use of a spreader and the staffing and equipment allocation issues involved. He stated that he would not likely have been able to accomplish this in the supervisor position because he would have had to involve the manager in those types of arrangements and then it “may or may not get done.”

[37] In response to the evidence of Mr. Simpson, Mr. Haynes and Mr. Faul, RCMMA called Ken Kovatch to testify. Mr. Kovatch has held the position of superintendent of concrete since July 2003, having held the position of supervisor of concrete maintenance for the prior six years. Mr. Kovatch’s educational background includes a B.A. degree with classes in administration and computer science. When asked what the most significant change was as a result of the restructuring, Mr. Kovatch indicated that there was an increase in the number of people reporting to him (60 employees, 30-32 of whom are full-time) and that, as a result, he felt more accountable. Mr. Kovatch stated that prior to the restructuring there was what he called four “fiefdoms” where each supervisor “looked after their own” and conflicts would occur between the work areas over the equipment they used or how they functioned. With the change to

having two superintendents, they work together such that all the employees are considered to be available to them and there is a greater focus on operational goals rather than always attempting to keep “your” employees happy and manage the conflict between your area and another.

[38] We will not attempt to review every job duty and responsibility which Mr. Simpson and Mr. Haynes testified was the same for both the supervisor and superintendent positions but will comment on what duties and responsibilities the Board finds more relevant to our inquiry. Mr. Faul’s and Mr. Kovatch’s evidence will also be discussed.

[39] With respect to recommending and implementing changes and improvements in construction and maintenance procedures, material requirements, equipment utilization, staffing levels and work schedules, Mr. Simpson testified that, as a supervisor, his involvement went beyond simply having input. As both supervisor and superintendent he was responsible for making recommendations for change and implementing change, whether the change was to the schedule, the assignment of employees to the work, or the assignment of equipment. He stated that he was never overruled concerning those decisions by a manager and believes that, in the superintendent position, he could be overruled to the same extent as when he was a supervisor. Although Mr. Simpson made little comment concerning the duty to lead staff within established priorities, standards, procedures and financial controls, his testimony overall indicated that this was very much part of his duties as a supervisor and superintendent. Mr. Haynes indicated that supervision of employees and leadership were important to both the positions of supervisor and superintendent and he was required to ensure the work was completed and on time. He stated that the procedures in the area had been documented and he acted within them. If he had questions concerning established priorities or standards, he asked the manager, although he stated that he did not bother the manager with any supervisory or manpower decisions he made.

[40] Mr. Faul indicated in his evidence that having the four distinct groups prior to the restructuring led to problems with the allocation of staff and equipment, each supervisor focusing on his or her own priorities making it difficult to share staff and equipment, as well as dealing with conflicts between staff members. The restructuring allowed them to re-focus their resources, which he hopes will have the effect of becoming more efficient and reducing the overtime required. Mr. Faul indicated that in the summer months he supervised 85-90 employees and in the winter he and the superintendent of concrete supervised 110 employees. Mr. Faul stated that the superintendent is more responsible for planning the direction of the area and deciding "how to get there." Changes to resource allocation have caused some conflict with staff, particularly with the assignment of work and overtime and he felt that there could be some problems with the implementation of performance standards if he were still a member of CUPE. Mr. Faul outlined some of the recent undertakings which occurred in his tenure as superintendent. Upon his appointment it was necessary for him to examine construction work scheduling and, in conjunction with the superintendent of concrete and having received approval at an operations meeting with his manager, he began the process of hiring 25 to 30 more employees, also with the assistance of human resources personnel and in consultation with their manager. He also identified a need for an additional work crew in order to fully utilize the budget and he re-allocated staff and leased equipment accordingly. He also examined work processes and standards in an effort to be more program-oriented. He applied this to the winter maintenance program, re-allocating resources between the sanding and plowing groups. Mr. Faul stated that he and the other superintendent were involved in developing options for a new shift schedule however the schedule was actually negotiated between human resources and CUPE. At the end of the construction season they examined the budget and decided to perform patching work to more fully utilize the budget. Mr. Faul estimated that his work in the field with the crews has decreased since he became the superintendent, having previously spent approximately 40-50% of his time there whereas now that is limited to 10-15%. He stated that he now spends more time planning and managing an increased number of employees.

[41] Mr. Kovatch indicated that he feels he has greater input into operational planning. Although policies are set by the City's administration and adopted by City Council, he is involved in developing programs to meet those goals. He and the other superintendent have also developed performance measurement and this was limited under the prior structure because they were not working as one unit. After the restructuring, they were able to switch people between projects, utilizing the maintenance crew to work on capital projects which points to the flexibility that was not there when he was a supervisor because one supervisor did not want another using part of his budget to do the other's work. They also worked to standardize processes in all areas. In cross-examination by counsel for CUPE, Mr. Kovatch acknowledged that he had both the knowledge and ability to have performed these functions as a supervisor but was never asked to by his manager. As an example of changes he made he referred in his examination-in-chief to the integration of the plowing and sanding functions for winter maintenance and the creation of shifts through which all the employees rotated. In cross-examination by counsel for CUPE, he acknowledged that the plowing and sanding programs were actually integrated prior to the restructuring and the change that came about when he was a superintendent was the joining of manpower to be assigned through the shifts. Prior to the restructuring, the asphalt maintenance group performed the sanding and plowing function on the morning shift while concrete maintenance performed the functions on the afternoon shift.

[42] Mr. Faul testified that the assignment of work to cover for absenteeism falls to the foremen after being advised of the process by the superintendents. He indicated that the superintendents would be accountable to their managers or general manager if a problem occurred.

[43] Mr. Faul indicated in his evidence that he meets weekly with a "management team" which includes the other superintendent, their manager and a technical person, to discuss operational issues. Any changes and recommendations would be discussed at these meetings. Taken as a whole, his evidence indicated that approval for decisions he proposed would have to be obtained at these meetings and that they would need to ensure that all affected by a change were in agreement along

the way. Occasionally it was a matter of presenting ideas and, if there were no questions or concerns, he proceeded with the change.

[44] Mr. Simpson and Mr. Haynes indicated that they both, as supervisors and superintendents, organized and directed winter maintenance.

[45] As a supervisor and as a superintendent, Mr. Simpson claims that he approved expenditures in his area. He had his own requisition book and could order what was required to carry out the work in his area. Mr. Haynes' testimony was similar and he added that he had authority to issue a requisition for a value up to \$10,000.00 although he would advise his manager if he intended to go higher than \$5,000.00.

[46] As a supervisor Mr. Simpson testified that he was involved in staff selection and initiated the training of staff, setting up training with the training officer for the City. Mr. Haynes also testified that he had interviewed and hired employees, describing the process by which employees were hired. Essentially, human resources created a short list of applicants and he and the manager would choose who to interview. Human resources would arrange the interview and all three would conduct the interviews and then a selection would be made. Mr. Haynes also indicated that he arranged for training of employees through the training officer based on requests by the employees. Both Mr. Simpson and Mr. Haynes indicated that they were responsible for performance appraisals and Mr. Haynes indicated that in the acting position he would conduct the appraisals of the foremen and each foreman would essentially review the performance of the employees he supervised, having first level knowledge and observation of those employees.

[47] Mr. Kovatch indicated that the hiring took on a different focus following the restructuring. They began to hire for the roadways operations generally, instead of just for concrete, looking for applicants with a broader range of skills. Mr. Kovatch, Mr. Faul and human resources personnel were involved in the interviewing and Mr. Kovatch and Mr. Faul would advise human resources of their selections. Mr. Faul, on behalf of the City, indicated that, with regard to the winter maintenance season, he initiated the

training of seasonal employees for peak periods. Mr. Kovatch testified that he developed a program that would essentially cross-train employees on equipment. This did not occur when he was a supervisor because the supervisor only trained his people for his specific needs. In cross-examination by counsel for CUPE, Mr. Kovatch acknowledged that this was the type of training CUPE had been requesting for some time and that the restructuring has actually assisted in meeting the requirements of the collective agreement with regard to training.

[48] Mr. Simpson testified that strategic decision-making was part of both the supervisor and superintendent positions. Mr. Haynes provided an example of the strategic planning he engaged in as a superintendent whereby he attended a couple meetings with the operations manager, a person from human resources and another superintendent to discuss a new winter shift. As a supervisor, Mr. Simpson performed planning functions although at the time he was both a supervisor and a superintendent, the long term planning came from higher up in the organization.

[49] Mr. Simpson also testified concerning his involvement in overtime management, being the same both as a supervisor and superintendent. The City attempted to establish that there was increasing concern with overtime such that it was necessary for the new superintendents to take action to reduce overtime. Mr. Simpson indicated that as a supervisor he was always asked to reduce overtime and agreed that this was stressed as important when he became a superintendent. Mr. Haynes also focused on reducing overtime when acting in the positions, the reduction of overtime being a stated priority. Mr. Faul testified that he believes he has been able to reduce overtime costs and pointed out that it can be a controversial issue with the employees.

[50] Mr. Faul believes that as a superintendent he will be part of strategic planning. He indicated in cross-examination by counsel for RCMMA that he was required to implement the policies of senior management and that, if consulted, he would provide operational solutions. He gave an example of the need to do succession planning because a large part of the workforce will be retiring in five to eight years and therefore a training plan is necessary to address that issue. In cross-examination he

acknowledged that many of the issues involved with succession planning would need to be done through collective bargaining in which he is not directly involved. Mr. Faul has also been involved with a steering committee in relation to combining the construction and maintenance of roadways into one project. A work team has been developed to implement a pilot project. In cross-examination, Mr. Faul indicated that, if changes are needed to the plan, it would be only the general manager who would have such authority. Mr. Faul believes that he would not have been part of these opportunities for change as a supervisor under his prior manager because that manager would have had to be open to making those decisions.

[51] With respect to discipline, Mr. Lenko on behalf of CUPE indicated that it was quite common for an employee in a supervisor position to administer discipline and send letters of discipline and that this did not create a conflict between that employee and other members of CUPE. Mr. Simpson indicated that he had issued a two or three day suspension while in the position of supervisor and that his authority did not appear to change when he became the superintendent. He did not have occasion to terminate an employee while in the superintendent position. Mr. Haynes testified that when he was an acting supervisor he had occasion to issue a verbal warning, written warning and a one day suspension and while he initiated and wrote the letters of discipline, he acknowledged that they were scrutinized and approved by the manager. No grievances arose while he was in the acting superintendent position.

[52] In relation to his attendance at grievance meetings on behalf of the City, Mr. Simpson maintained that he only participated to the extent that he relayed the circumstances (as the grievance most often arose as a result of a decision he made as the employee's supervisor) and expressed any opinion he might have. He did not feel that he was representing either the employee or management (just himself) and did not feel that defending his position put him in conflict with the members of CUPE. The grievances he was involved with were primarily about job postings. He testified that he felt no repercussions from CUPE for the extent of his participation in discipline and grievance handling. His level of participation in the grievance procedure did not change when he became a superintendent, although he acknowledged he may not have dealt

with any grievances during his tenure in that position. It was Mr. Lenko's observation that supervisors would attend grievance meetings on behalf of the City in order to defend their actions. Mr. Simpson could not identify any duties he performed as a supervisor or superintendent that would cause a conflict with him remaining a member of CUPE and nor could Mr. Haynes, including the disciplinary power he had exercised.

[53] Mr. Faul testified concerning the disciplinary role he exercised as a superintendent. He stated that he might administer minor discipline, but that for warnings and suspensions he would only determine culpability and consequences, with the ultimate decision being made in consultation with a manager. He would prepare the letter of discipline and present it to his manager who could overrule his intended action. In relation to a suspension he issued, he indicated that he sought his manager's approval prior to doing so. He believes that his role with respect to terminations would remain the same in that it would be limited to making a recommendation. He was uncertain who would make the final decision in that regard, suggesting it might be the general manager or perhaps the manager. Mr. Faul indicated that, for the most part, this process was the same as when he was a supervisor, although he believes that the manager, with Mr. Faul's involvement, handled the suspensions. Mr. Faul believed that his role in relation to grievances had changed somewhat when he became a superintendent in that, as a superintendent, he was involved with the presentation of the facts, describing how the grievance came about, interpreting the collective agreement and presenting the grievance on behalf of the department. In cross-examination by counsel for RCMMA, Mr. Faul stated that he believed that it would be easier to provide an analysis and interpretation of the collective agreement if he was not a member of CUPE.

[54] Mr. Kovatch testified that his role in relation to discipline did not change when he became a superintendent. Whether he is issuing a warning or a suspension, he first discusses it with his manager and consults with human resources. He may make a recommendation about termination but his manager makes a recommendation and he believes the city manager is involved. He feels he is more involved in grievances since becoming a superintendent in that part of his role is to provide justification for his

actions. He acknowledged in cross-examination that management's response to a grievance that he was involved with actually came from Mr. Murray.

[55] With respect to the matter of collective bargaining or negotiating with CUPE, Mr. Simpson indicated that he was not involved in bargaining as a supervisor or as a superintendent. Mr. Kovatch also indicated that as a superintendent he is not involved in collective bargaining. Mr. Faul testified that his only role in relation to collective bargaining would be to act as a resource to the City for information about operations. He also might suggest what is required contractually to perform the job more efficiently. In cross-examination by counsel for RCMMA, he acknowledged that he has been part of the bargaining team for RCMMA. Regarding the ability to affect the economic lives of fellow employees, Mr. Simpson testified that he could do so only in a limited way – through his choices concerning the assignment of work to acting positions or for overtime, which are largely determined by seniority and governed by the collective agreement. Mr. Lenko provided the observation that both the superintendent and supervisor can have some economic impact on the employees through the assignment of their work.

[56] Regarding budgetary matters, Mr. Simpson testified that as a supervisor he had no actual authority to set the budget but was involved with the manager in putting it together. He indicated that he provided input and monitored and controlled where and when expenditures were made. Mr. Haynes also indicated that he would control expenditures and monitor them with the view of staying within budget by, for example, organizing the workforce by reference to the budget. There was also testimony that the budget often remained the same year to year except to incorporate any planned changes in operations. Other evidence established that the creation of the budget is somewhat a team effort, involving the managers, the engineer and the supervisors (and even those below the supervisors), but that ultimately the authority lies with City Council to make the decision on the budget.

[57] Mr. Faul also provided evidence concerning his role in budgeting. He stated that his participation has not really changed from what it was as a supervisor,

providing input and cost estimates. He stated that capital budgeting for the area is done through the engineers, although he may have some input. Ultimately it is City Council who approves the budget. With respect to the maintenance of budgets he sees his role as different in the superintendent position in that he is involved in making reallocation decisions. Mr. Kovatch testified that the budget is set by City Council and his involvement is more from the perspective of how the budget will be used.

[58] Mr. Simpson acknowledged that the restructuring and the combining of maintenance and construction in the asphalt and concrete areas was a significant change, although it appeared to have been implemented in a gradual fashion. He stated that a significant amount of time was spent on the task of merging the two units together and determining who would control what. In any event, he felt that, even though the number of employees reporting to him had doubled, his responsibilities stayed the same, perhaps exercising them at a broader level because the areas of responsibility had been combined. Mr. Haynes testified concerning his view of the restructuring. It appeared to him that, following the restructuring, there was one person (the superintendent) instead of two supervisors of the same level, making decisions in the combined areas of construction and maintenance, leading to greater efficiencies and a streamlining of priorities in the combined area. In other words, it was the restructuring and not the creation of a superintendent position which would lead to greater efficiencies and effectiveness in the work area.

[59] In cross-examination, Mr. Faul indicated that he had not experienced a conflict between his duties and his membership in RCMMA and he agreed with the proposition that he would not need to be out-of-scope to perform the duties and responsibilities of his position. In cross-examination by CUPE, Mr. Faul acknowledged that a number of changes he made as a superintendent could have been made in his position as supervisor had they received appropriate direction from their manager at that time. In re-examination by counsel for the City, Mr. Faul indicated that the prior structure with four areas and four supervisors was part of this problem. He also indicated that it was not necessarily the "fault" of the prior manager that changes were not made, it was also a matter of timing. The new structure provided the ability to make the required

changes to resource allocations across all four areas. In cross-examination by counsel for CUPE, Mr. Faul stated that it was not his status as a member of CUPE that prevented him from developing and carrying out these plans. He stated that there was nothing in the collective agreement or bylaws of CUPE that would prohibit his participation in planning or making decisions about resource allocation, as he had as a superintendent. He also acknowledged that it would not be absolutely necessary for the superintendent position to be outside the CUPE bargaining unit in order to function in the way he described and, although he noted that there may be some problems, he did not expand on what those problems might be. Mr. Faul also acknowledged in cross-examination that he has a personal stake in the outcome of these proceedings. When he quit his employment with the City in 2002, he lost his seniority in the CUPE bargaining unit and therefore, if this position was in the CUPE bargaining unit, he might not have obtained it, if a senior qualified applicant in the CUPE bargaining unit had applied for the position.

[60] Mr. Kovatch was questioned regarding whether there was a conflict between his duties and being a member of CUPE. The only “conflict” he identified in his superintendent position was the changes he made to shifting – the employees were not very happy with it. He acknowledged that being a CUPE member would not prevent him from carrying out his duties in the superintendent position although he may feel a bit “hampered.” He described this as a “mind-set” or “mental conflict” in that he had to treat operational goals as his priority rather than the happiness of the employees he supervised. He agreed that he had this same “mental conflict” as a supervisor but because the number of employees he supervised was now higher, this mental conflict “went up.”

[61] John Ullrich also testified on behalf of CUPE and has worked with the City in a variety of positions, all as a member of CUPE, for in excess of 28 years. Mr. Ullrich has, for the last twelve years, held the position of supervisor sewage collection, reporting to the manager of sewage collection, water distribution, water supply and meter shop. In his supervisor position, Mr. Ullrich is responsible for the organization and supervision of 44 employees in the summer months and 32 in the winter months. With reference to the

job description for the position of superintendent, Mr. Ullrich testified that he performed all the duties and responsibilities listed there in the performance of his supervisor position (although in the area of sewage collection), except those duties that specifically related to the asphalt area such as winter road maintenance. In cross-examination, Mr. Ullrich acknowledged that the job description for supervisor of asphalt construction was also comparable to the job he performed and that he could not be certain of the duties performed on a day-to-day basis by the superintendent of asphalt.

[62] Mr. Ullrich provided extensive and detailed evidence establishing that the performance of his duties and responsibilities as a supervisor were the same as outlined in the superintendent job description. While we will not attempt to repeat all his evidence in this regard, we will focus on his evidence that is most relevant for the current inquiry.

[63] With respect to strategic planning, Mr. Ullrich indicated that he has been very involved in long term planning, including the examination of new programs and projects to improve efficiency and effectiveness. This involves recommending and implementing changes to procedures, equipment utilization, staffing levels and work schedules. He gave a number of examples including his involvement in developing documented procedures for the performance of the work in his area such as determining to up-grade equipment and the development and implementation of a new winter shift schedule. Mr. Ullrich is not aware of the existence of a section management team although he recalled that, in the past, the director would have planning meetings at which the supervisors attended. Mr. Ullrich acknowledged that he would not be considered on the “management team” in his area.

[64] Mr. Ullrich testified that he approves requisitions and expenditures within the limits of his authority, indicating that he has a limit of \$10,000.00 but does not write orders over \$5,000.00 without speaking to his manager.

[65] On a daily basis, Mr. Ullrich supervises and organizes the workforce in his area. In the assignment and reassignment of work he must consider the requirements of the collective agreement and any certifications the employees may have. Mr. Ullrich

testified that he leads the staff and is responsible to plan, direct, monitor and evaluate the work activities, within standards and procedures which he helped create.

[66] It is also Mr. Ullrich's responsibility to manage overtime, although he acknowledged that, while there are some emergencies which he manages in such a way to reduce overtime, overtime is not typically a problem that arises in his area.

[67] Mr. Ullrich indicated that he is responsible for the interviewing and recommendation of staff selection and noted that human resources, his manager and the foremen may be involved in that selection. Mr. Ullrich also indicated that it is his sole responsibility to arrange for and keep track of the training of employees in his area, and relayed an example where he arranged for training in a specialized course through trainers outside the employ of the City. Mr. Ullrich is also responsible for the assessment of conduct of probationary employees which he carries out by gathering information from the foremen, completing the appraisal, and going through the evaluation with the employee.

[68] Mr. Ullrich also testified concerning his involvement with discipline and grievance handling. Mr. Ullrich provided examples of occasions where had issued warnings and suspensions and stated that, when he decided that a sanction was warranted, he consulted with human resources. He further stated that he would not send a letter out until his manager had approved it although he provided a specific example that ultimately went to arbitration over a grievance filed by the employee, where he did not get approval/permission of his manager during the disciplinary process. There has been only one termination in his area and it was the director who authorized the action, without the involvement of his manager. Mr. Ullrich indicated that he submitted reports to management concerning action taken against an employee and that he had testified as a witness for management at arbitration. Mr. Ullrich indicated that he faced no repercussions from CUPE for doing so and that he feels no conflict with members of CUPE over his involvement in the duties related to discipline and grievance handling.

[69] With respect to budgeting, Mr. Ullrich testified that he is directly involved in the creation and setting of the budget and, while the budget remains largely similar year to year, he has been directly involved in making projections and the creation of new projects/programs citing an example where he studied an issue, wrote a report and sought out and received approval for a 1.4 million dollar project by City Council. Mr. Ullrich indicated that he is involved in determining where the money allocated to his area is spent and the authority to decide when to spend it, for example, in terms of developing start and end times for programs and the prioritization of repairs. He acknowledged some overlap of responsibility with the engineer because his area spends a portion of their budget for some of the summer programs.

[70] Mr. Ullrich testified that there is no superintendent position between him and his manager although he acknowledged in cross-examination that a restructuring may take place which involves combining the sewer systems area (for which he is the supervisor) and water systems area and resulting in the creation of a superintendent position. Several months ago he viewed a proposed organizational chart for this restructuring and, while he has not seen a job description for the position, he was advised that he would be appointed to the position of superintendent of underground services, which would oversee these combined areas. When asked in cross-examination whether the superintendent position would be a different position, Mr. Ullrich responded that he “assumes” so and whether there would be increased responsibility and pay, he responded that he “hopes” so.

[71] Little emphasis was placed by any of the parties on the qualifications or the skills and abilities required for the positions. Mr. Simpson testified that supervisory skills and abilities were required for the both the supervisor and superintendent positions. Despite the stated qualifications, the only training that he had in the superintendent position was to learn the philosophy and objectives of a municipal government. Mr. Wandzura testified that, through the interview process of the supervisors chosen for the superintendent positions, the City recognized that the former supervisors had the skills and abilities to perform the superintendent positions. Mr. Wandzura also testified that no training has been given to the superintendents since

they have filled the positions (he only spent some time with them doing operational planning) however, training would be available to them just as it is to any other employee of the City. Mr. Faul indicated that he believed that the educational qualifications of the position had changed, although he was not specific. He noted that he had some education in local government administration and some accounting courses.

[72] A review of the position descriptions indicate there were some changes to the qualifications required for the superintendent positions as opposed to the supervisor positions. Prior to the restructuring, the supervisors were required to have Grade 12 education, technical courses in construction and maintenance, as well as courses in supervision and administration. The experience required was for the most part, consistent with all supervisor positions and stated eight to ten years in roadways construction or maintenance including experience in a supervisor capacity. While the stated educational qualification for the superintendent positions seemed higher in that it required a diploma in civil engineering technology and courses in supervisory development (or certification in a public works supervisory development program), the experience required decreased to five to eight years of related roadways engineering construction. Notably, an applicant without the stated qualifications could be considered on the basis of their combined education and experience.

[73] With respect to the stated knowledge, abilities and skills required for the superintendent and the supervisor positions, there is little difference. In addition to those listed in the supervisor job description, the superintendent positions require knowledge of the philosophies and objectives of municipal government, the ability to perform difficult technical job related assignments, skills in planning the details of work projects from general instructions and basic computer/keyboard skills. The only other difference is a reference to demonstrated "leadership" rather than demonstrated "supervisory" skills. Overall, the knowledge, skills and abilities required for the superintendent positions are related largely to technical knowledge of the operations with no reference to skills or knowledge regarding human resources or labour relations.

[74] Very little evidence was entered concerning the role of the assistant superintendents. Mr. Wandzura testified that the assistants do not have any employees reporting to them but they report to and assist the superintendents. They also assist the foremen. It is the City's longer term plan that, following appropriate training of the foremen, the assistant superintendent positions will be eliminated.

[75] A review of the respective collective agreements entered for RCMMA and CUPE illustrates the types of positions which belong to each bargaining unit. While it is important not to place too much emphasis on the title attached to a position, a few observations can be made. The RCMMA unit includes a variety of positions, not all of which appear to have supervisory or management duties. One example might include those involved in information systems or engineering. A review of the positions listed in the collective agreement indicates that many of them share the title "coordinator," "analyst," "officer" or "manager." It does not appear that there is a position titled "superintendent" in the RCMMA collective agreement although there is one supervisor listed. The relevant collective agreement with CUPE, covering the larger bargaining unit, contains numerous and varied position titles. It is the Board's observation that it also includes several of the position titles of "coordinator," "crewlead," "foreman," "officer," "technician" or "technologist," as well as several "supervisor" positions. Considering the history of the RCMMA unit and the current status of positions in each unit, it is obviously a difficult task to delineate positions between the two units. Mr. Lenko on behalf of CUPE acknowledged that there may be a place for RCMMA but that a lot of the positions assigned to the RCMMA bargaining unit could be in CUPE, presumably on the basis of a lack of a conflict of interest. He agreed in cross-examination by counsel for RCMMA that the placement of positions in the RCMMA bargaining unit would depend on the level of responsibility, the power exercised and the scope of the position and that it may come down to a fine distinction whether one belongs to CUPE or RCMMA.

[76] In his cross-examination by counsel for RCMMA, Mr. Wandzura agreed that the RCMMA unit consists of those employees who fall between the rank and file (belonging to CUPE) and the out-of-scope personnel. They include supervisors, coordinators and managers, although not all RCMMA members manage employees. In

the roadways division they have largely held positions of a technical or consulting nature.

[77] Ms. Legault currently holds the position of open space services coordinator. She testified that the RCMMA bargaining unit represents approximately 100 different positions that fall primarily into two groups. One is a middle management group (approximately 40%) where authority is delegated to middle managers by managers or general managers to operate a business unit. The other group consists essentially of professional people (approximately 60%) such as engineers and information technology personnel. A number of the positions supervise one or two staff and some supervise a greater number. In cross-examination by the City, Ms. Legault acknowledged that those in the professional category, such as Bob Berry in the roadways operations division, typically concentrate on programs, not people. Ms. Legault also testified that those in the RCMMA bargaining unit are typically involved with the management team in an area and often carry the titles “manager,” “coordinator” and “supervisor.” In cross-examination by CUPE, Ms. Legault acknowledged that in the CUPE bargaining agreement, there are several “coordinator” and “supervisor” positions.

[78] Ms. Legault also testified that she believes that the superintendents in question belong in the RCMMA bargaining unit. The RCMMA has a classification committee which analyzes job descriptions written by the City and placed in the RCMMA unit for a determination of whether RCMMA agrees with the salary grade for the position set by the City. Brian Eastley, chair of that committee also testified for RCMMA. He indicated that the superintendent positions were placed at pay grade level 6 (on a scale of 1 – 8) based on set criteria including degree and level of responsibility, education, knowledge, complexity, supervisory powers, impact, internal and external contacts and the sensitivity of the information shared. While he recalled the committee on one occasion questioning the jurisdiction of a position and whether it should be out-of-scope, they only occasionally look at that issue. The primary function of the committee is to rate the job RCMMA has been given by the City and, as far as Mr. Eastley is aware, the question of scope was not considered in relation to these positions. Ms. Legault indicated that CUPE was not involved in this process.

[79] A letter of understanding between the City and CUPE was entered as evidence concerning a superintendent position created some time prior to the date of the letter's signing, that is January 29, 2001. The letter indicates an agreement that "the position of Superintendent of Open Space Services and it's [sic] incumbent, Mr. Ken Poure, will be transferred from the Local 21 jurisdiction to Out of Scope." The letter also contains a preamble which reads: "Nothing in this Letter of Understanding shall be construed as altering the existing rights and/or obligations of either party under the provisions of the Collective Bargaining Agreement except as specified."

[80] Mr. Lenko of CUPE testified that this agreement arose out of negotiations with the City. The City had wanted to move the superintendent position out of the scope of the CUPE bargaining unit and, because Mr. Poure also wanted to become out-of-scope, CUPE negotiated with the City and in return obtained three new bulletined semi-skilled positions in the scope of CUPE. A job description for this position was entered into evidence and Mr. Lenko indicated that the job description, dated one day after the letter was signed, was made as part of the agreement with the City, although CUPE had no input into its development and did not approve same. Mr. Lenko acknowledged in cross-examination that Mr. Poure would be involved in formulating the budget.

[81] Other than the superintendent of open space services, the certification Order for CUPE makes reference to two other out-of-scope positions titled "superintendent."

[82] Ms. Legault testified about what she believed were comparable positions to the superintendent positions which are currently assigned to the RCMMA unit. In the project services and landscape design division she referred to the coordinator of open space and facility planning and the coordinator of grants and agreements. She also referred to two positions in the community and leisure services division, the supervisor-Sportplex and outdoor pools and the coordinator-sports and recreation facilities. With regard to the latter position, which is responsible for facilitating and supporting the "development, provision and operation of public sport and recreation facilities" and acts

as a liaison between the City and sport organizations, the employee reports to an out-of-scope manager. In cross-examination by CUPE, Ms. Legault acknowledged that the supervisors of the North West Leisure Centre and the Sandra Schmirler Leisure Center, who appear at the same level as these other positions she referred to, are not within RCMMA.

[83] Ms. Legault is employed in the position of open space services coordinator which, according to the job description, is involved in overseeing “the day-to-day business operations within the open space management division.” This would include being part of a management team (and reporting to the general manager) and having the responsibilities of supervising administrative support staff, handling information technology, coordinating the development of policies and procedures and assisting staff with preparation of budgets, reports and correspondence. Ms. Legault testified that she supervises eight administrative employees in the CUPE, Local 7 bargaining unit. In her position she can take disciplinary action (except for termination) and makes decisions about hiring. While she feels she need not be out-of-scope to perform her job she believes it would be more difficult to carry out her job if she were a member of CUPE.

[84] Ms. Legault also testified about the financial administration division and pointed out the existence of six coordinator positions in that division who report to an out-of-scope manager and who have between zero and eight employees reporting to them, employees who are primarily accounting or distribution clerks, all belonging to CUPE, Local 7. There are also five system support analysts in that division who belong to RCMMA. A review of the organization chart, however, also indicates that there are several CUPE, Local 7 positions that report directly to an out-of-scope manager. They include the positions of purchasing agents, accountants, accounting clerks, financial systems analysts and payroll officers.

[85] Mr. Eastley has been employed with the City for five years and is the financial services coordinator reporting to the manager of financial services in the financial administration division. Regularly reporting to him are three permanent

accounting clerks (CUPE, Local 7), two permanent distribution clerks (CUPE, Local 21) and one casual assistant distribution clerk (CUPE, Local 21). Based on the position description, he is one of several coordinators responsible for managing the activities of an accounting and budget support group. His area provides budget and accounting support in the engineering and works department. For the areas within that department he performs monitoring of variances and assists them with the development of their budget. He also provides financial information to assist with their decision-making. As part of the budgeting process, he meets with the managers involved and provides them with financial information including the implications of any requests they make. With regard to his staff he is responsible for directing their work and providing assistance. Being that his is a support-based area, it is not necessary for him to be involved in performance measures. His staff is primarily engaged in discrete tasks such as entering payroll information, filing year-end reports, etc. He has been involved in hiring staff on one occasion making a determination who to interview and hire. He has not yet been involved with discipline. Mr. Eastley testified concerning the educational qualifications of the position which he has met by having a business administration degree and a chartered accountant designation. Although not a requirement, he also holds a certificate in computer science.

[86] Ms. Legault analyzed the position descriptions for the superintendent of asphalt, assistant superintendent of asphalt and the prior position of supervisor of asphalt construction (indicating that her analysis would apply to the superintendent of concrete position as well because it is virtually the same) and she offered her opinion concerning their differences. She provided an opinion that a number of the duties of the superintendent are new and are not contained in the position description of the supervisor of asphalt construction and she identified them as such. She also identified, with reference to the supervisor of asphalt construction position, which duties went to the superintendent and assistant superintendent positions. Lastly, with reference to the assistant superintendent position she identified that all the duties listed came from the former supervisor position. The Board has reviewed and considered her evidence on these points having regard for the fact that she did not actually perform any of these job

functions and that job descriptions provide only a part of our consideration, the actual job being performed being of far greater importance to the current inquiry.

Relevant Statutory Provisions:

[87] The relevant statutory provisions are as follows:

(f) *"employee" means:*

(i) *a person in the employ of an employer except:*

(A) *a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*

(B) *a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*

...

5 *The board may make orders:*

(i) *rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*

(j) *amending an order of the board if:*

(i) *the employer and the trade union agree to the amendment; or*

(ii) *in the opinion of the board, the amendment is necessary;*

...

(m) *subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;*

...

11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:

(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;

...

5.2(1) On an application pursuant to clause 5(m), the board may make a provisional determination before the person who is the subject of the application is actually performing the duties of the position in question.

(2) A provisional determination made pursuant to subsection (1) becomes a final determination after the expiry of one year from the day on which the provisional determination is made unless, before that period expires, the employer or the trade union applies to the board for a variation of the determination.

Arguments:

[88] Mr. Matheson, on behalf of CUPE, argued that, while there was a change to the organizational structure of the roadways and traffic division to better utilize equipment and staffing, the superintendent positions were not new positions in substance. The superintendent positions are effectively the same as the supervisor positions (CUPE members) under the prior structure. CUPE argued that there were no clear or compelling reasons to remove the positions in question from CUPE and place them in either the RCMMA bargaining unit or out-of-scope, based on the CUPE certification Order, the RCMMA certification Order being more limited, the history of the positions, a lack of a conflict of interest with CUPE members, and the duties and responsibilities of the positions, including their lack of independent authority in matters of discipline, hiring, budgeting, planning and decision-making.

[89] CUPE cited several cases involving the assignment of positions in a multi-bargaining unit workplace, all of which the Board has reviewed and many of which are cited in these Reasons.

[90] CUPE argued that the City should be found guilty of the unfair labour practice pursuant to s. 11(1)(c) because of its failure to negotiate with CUPE regarding the assignment of the superintendent positions. CUPE stated that the City should be held accountable for its unilateral action of placing these positions in the RCMMA bargaining unit.

[91] Ms. Wartman, counsel for the City, maintained that the incumbents in the superintendent positions are not employees within the meaning of s. 2(f) of the *Act* and as such, should be placed out of the scope of any bargaining unit. The City seeks a determination in that regard pursuant to s. 5(m). The City filed a number of arbitration cases and decisions of this Board and others to support its submission that these positions must be placed out-of-scope because they exercise substantial supervisory authority, have an economic impact on the lives of their fellow employees, they hire, fire, demote, promote and discipline, they have significant decision making ability affecting others' terms and conditions of work, they are involved with formulating the budget, and because the number of employees they supervise has increased, they are "primarily" performing functions of a managerial nature. The City argued that these factors, along with the evidence of the written job descriptions and the definition of "employee" under the *Act*, suggest these positions should be placed out-of-scope. The Board has reviewed the written brief filed by the City and considered the cases cited in the brief and in argument.

[92] In the alternative, if the Board finds that the positions in question should not be placed out-of-scope, the City argued that the positions are appropriately placed in the RCMMA bargaining unit.

[93] With regard to CUPE's unfair labour practice application, the City acknowledged it has not followed the proper procedure but did not concede it was guilty of the unfair labour practice.

[94] Mr. Ottenbreit, counsel on behalf of RCMMA, argued that the superintendent positions are most appropriately assigned to the RCMMA bargaining unit. He submitted that the bargaining unit is actually a broader "all employee" unit than is CUPE's, covering 26 departments, and that it is not restricted to middle management, professional and technical personnel. RCMMA asked the Board to favour it in its preference for larger bargaining units, although the number of employees it represents is significantly less than the number represented by CUPE. RCMMA argued that the positions in question, having been placed in the RCMMA bargaining unit from their inception, do not belong out-of-scope, referring to several Board decisions dealing with issues of scope on a certification application, all of which the Board has reviewed. Many of those cases stand for the proposition that exclusions should be made on as narrow a basis as possible and the cases provide the usual tests for exclusion of a position.

[95] RCMMA also argued that the superintendent positions were new ones, not recycled from the former supervisor positions, in that they have increased power and responsibilities, perform both managerial and operational functions, supervise a great number of employees, have a higher rate of pay and a similarity with a number of RCMMA positions, leading to a closer community of interest with that unit. Differences in the superintendent and supervisor positions were also emphasized, as was the evidence concerning a potential conflict of interest with members of CUPE.

[96] Lastly, RCMMA argued against a provisional order, believing there was substantial evidence before the Board of the superintendents' duties and responsibilities and that they are not likely to evolve into "something else" in the next several months.

Analysis:**(1) Unfair Labour Practice - Process for determining the assignment of new positions in a multiple bargaining unit setting**

[97] A number of Board decisions dealing with disputes over the assignment of positions in a multiple bargaining unit setting were filed by the parties. A review of those cases illustrates that s. 5(m) of the *Act* permits the Board to make provisional orders respecting scope before or after a position has been filled by an employer. Such an order becomes a final order after the passage of one year if no request is made to vary the provisional order.

[98] In *Canadian Union of Public Employees v. University of Saskatchewan and Administrative and Supervisory Personnel Association*, [2000] Sask. L. R.B.R. 83, LRB File No. 218-98, the Board reviewed the appropriate practice for an employer to follow when assigning a newly created position to a bargaining unit or units. The Board stated at 97:

[48] In Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre, [1991] 3^d Quarter Sask. Labour Rep. 56, LRB File Nos. 199-90 and 234-90, the Board held, at 59, that "where a new position is created in an 'all employee' unit, it remains in the bargaining unit unless excluded by order of the Board or agreement of the parties". An employer is required to bargain collectively with the Union in order to obtain agreement on an exclusion, or apply to the Board for an amended certification Order pursuant to s. 5(j), (k) or (m) of the Act. At 59 of its decision, the Board referred to its earlier decision in St. Paul's Hospital (Grey Nuns) as follows:

In that case, the Board heard a dispute between two competing unions regarding which of them represented a new position created by the employer. One unit was described as "all employees", while the second consisted essentially of exclusions from the all-employee unit. In those circumstances, the Board held that newly created positions would belong to the "all-employee" unit until such time as the Board found otherwise or the parties agreed.

[49] Finally, in Canadian Union of Public Employees, Local 21 v. City of Regina; Regina Civic Middle Management Association v. City of Regina, [1998] Sask. L.R.B.R. 464, LRB File Nos. 023-95 and 037-96, the Board set out the procedure for determining jurisdictional disputes between two unions in the following terms:

In attempting to determine the proper assignment of newly created positions in multi-bargaining unit structures, employers have an obligation to discuss the assignment with the unions affected and to refer any dispute pertaining to the assignment to the Board if an agreement cannot be reached. The Board would encourage employers to seek expedited hearings of such applications or to request pre-hearing conferences with the Board Vice-Chairperson or Registrar to determine if an informal assessment of the position by the Board office could assist in resolving the matter.

[50] In the present case, the University's practice of unilaterally assigning new positions to the ASPA bargaining unit, rather than to the CUPE bargaining unit, based on its understanding of the effect of the certification Orders, runs afoul of the principles stated in the St. Paul's Hospital case and the City of Regina case. Where an employer is faced with multiple bargaining units, it must follow these steps in determining the proper assignment of work:

1. notify the interested bargaining agents of the proposed new position;
2. if there is agreement on the assignment of the position to one bargaining unit, then no further action is required unless the parties wish to update the certification Order to include or exclude the position in question;
3. if agreement is not reached on the proper placement of the position, the employer must apply to the Board to have the matter determined under ss. 5(j), (k) or (m);
4. if the position requires filling on an urgent basis, the employer must seek an interim or provisional ruling from the Board or agreement from the parties on the interim assignment of bargaining units.

[51] As indicated in the cases cited, an employer is not entitled to act unilaterally by assigning the position to one bargaining unit over another. Although the University in this instance may have acted fairly and without favoritism, it nevertheless violated its obligation to bargain collectively under s. 11(1)(c) by assigning positions to the ASPA bargaining unit without obtaining the agreement of CUPE and ASPA or, failing such agreement, without obtaining an Order from the Board.

[99] In the present case, while the City may have acted fairly and without favouritism in assigning the two superintendent positions to the RCMMA bargaining unit and had notified CUPE and RCMMA of the organizational change and the proposed assignment of the positions to the RCMMA, it did not obtain the agreement of the bargaining representatives of those unions to the assignment following the discussions they had and the correspondence they exchanged. The City also failed to obtain an order of the Board regarding an appropriate assignment of the positions.

[100] The City asserted that it had examined the certification Orders, compared them to the job duties and responsibilities of the superintendent positions and considered its past practice in making the assignment. At the hearing the City, while acknowledging that it did not follow the proper procedure for assignment of a new position as set out in the case law, would not admit that it was guilty of an unfair labour practice or that it should be held accountable. The City did however indicate that it intended to follow the proper procedure in the future.

[101] There is nothing on the facts of this case to distinguish it from the situation in *University of Saskatchewan* case. It is no excuse for the City to say that it was not aware of the appropriate procedure to follow. The procedure is not a new one and the City has been involved in similar applications before the Board. This case is distinguishable from the decision in *Regina Professional Fire Fighters Association v. City of Regina and Regina Civic Middle Management Association*, [1994] 4th Quarter Sask. Labour Rep. 164, LRB File Nos. 202-94 and 226-94, where the City, after acknowledging a request by the RPFPA for input into the decision regarding the assignment of a newly created position, asked the unions involved to provide their

positions and information. Rather than respond to the City's invitation for further discussion (or resolution by the Board if an agreement could not be reached), the RPFPA filed an unfair labour practice application alleging a violation of s. 11(1)(c). The Board found that the City's proposal for a process to secure a resolution to the issue was a reasonable one and concluded that the employer had not refused or failed to bargain collectively. In this case, however, the City unilaterally assigned the position without first obtaining the agreement of CUPE and RCMMA or an order of the Board. As such, the Board finds that the City has violated its obligation to bargain collectively with CUPE under s. 11(1)(c) of the *Act*.

(2) Section 5(m) – Application for Determination Regarding Assignment of Disputed Positions

[102] In relation to the unfair labour practice application, the City took the position that it had properly assigned the newly created superintendent positions to the RCMMA bargaining unit. However, in its s. 5(m) application, the City changed its position asserting that these positions were more properly out of the scope of both bargaining units, although the request for a determination asks that it be determined whether the position is out-of-scope, or should appropriately be assigned to either RCMMA or CUPE. Given the City's position in relation to its s. 5(m) application, it is necessary for the Board to first consider whether those appointed to the disputed positions are "employees" within the meaning of s. 2(f) of the *Act*. If they are determined to be "employees," the Board will then consider whether they should be assigned to the RCMMA bargaining unit or to the CUPE bargaining unit. In *City of Saskatoon v. Canadian Union of Public Employees, Local 59 and Saskatoon Civic Middle Management Association*, [1998] Sask. L.R.B.R. 321, LRB File No. 232-97, the Board provided guidance on this issue in the context of a multi-employer bargaining unit, at 329:

The Board was not asked in this instance to determine if the positions in dispute are "employees" within the meaning of s. 2(f)(ii) of the Act. The parties have agreed that the positions do fall within either CUPE's or SCMMA's bargaining units. In the course of hearing the evidence of Mr. Edwards, the Board noted that it had decided in Saskatchewan Government Employees' Union v. Saskatchewan Liquor and Gaming Authority; Saskatchewan Liquor

Store Managers' Association v. Saskatchewan Liquor and Gaming Authority, [1997] Sask. L.R.B.R. 836, that the Board approaches the question of whether or not a person is "managerial" from the perspective of whether the person's job responsibilities place her in a possible conflict of interest with any potential bargaining unit. In addition, the Board adopted a streamlined approach for determining managerial status as follows, at 854:

The job functions which the Board considers central to the finding of managerial status includes the power to discipline and discharge, the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote. Other job functions, such as directing the workforce, training staff, assigning work, approving leaves, scheduling of work and the like are more indicative of supervisory functions which do not, in themselves, give rise to conflicts that would undermine the relationship between management and union by placing a person too closely identified with management in a bargaining unit.

Clearly, if a person has effective authority to impose discipline up to and including discharge on an employee, the person is a manager, not an employee, and cannot be included in any bargaining unit. Although it is unnecessary in this instance to determine the employment status of the superintendents, managers and officers under discussion in the application, the Board would simply remind the parties that if managerial authority as we have defined it above is devolved to the superintendent and manager level, the persons occupying the positions will not be "employees" within the meaning of s. 2(f)(i) of the Act. The City, in this instance, assured the Board that although the superintendents and managers would have input into the discussions regarding the discipline of employees falling within the CUPE bargaining unit such that their inclusion in the CUPE bargaining unit would give rise to a labour relations conflict, they did not have independent authority to discipline or dismiss. Such decisions are made in consultation with the branch manager, general manager and human resources department.

[103] In *City of Regina v. Canadian Union of Public Employees, Local 21 and Regina Civic Middle Management Association*, [1995] 3rd Quarter Sask Labour Rep. 153, LRB File No. 268-94 the Board was required to make a determination whether individuals in several superintendent and supervisor positions should be out-of-scope. The Board stated at 158:

The rationale for drawing a distinction between those who should be inside and those who fall outside a bargaining unit has often been discussed. In a passage which has often been quoted from the decision in Canadian Union of Public Employees v. Corporation of the District of Burnaby, [1974] 1 C.L.R.B.R. 1, the British Columbia Labour Relations Board outlined this rationale in the following terms:

The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, the employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand, an employee equally dependent on the enterprise for his livelihood, but on the other hand, wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

[104] Also in that case, the Board commented at 158 on the criteria to be used in making such an assessment, including consideration of whether there is an insoluble conflict between the individual's responsibilities toward management and the interests of fellow bargaining unit members:

At the heart of the decision the Board must make is the question whether in any particular case the duties which are attached to a position are of a kind and extent which would create an insoluble conflict between the responsibility which someone performing managerial functions owes to an employer, and the interests of that person and his or her colleagues as members of a bargaining unit. Because such a conflict is in many cases a matter of degree, it is impossible to state any one test which can be used to determine whether a particular person falls on one side of the line or the other. In International Brotherhood of Electrical Workers v. Caledon Hydro-Electric Commission, [1979] 3 C.L.R.B.R. 495, the Ontario Labour Relations Board made this point:

Because the Act does not contain a definition of the term "managerial functions", the task of developing criteria which can identify members of management has fallen to the Board and, in recognition of the fact that the exercise of managerial functions can assume different forms, in different work settings, the Board has evolved a number of "tests" to assist it in its enquiry. However, there are no magic formulae or rules of thumb which are universally applicable and dictate the result in every situation. The Board has consistently held that it must have due regard to the nature of the industry, the nature of the particular business, and the employer's organizational scheme. Essentially, the determination is a factual one, but the Board must always bear in mind that the purpose of its inquiry is to determine whether the functions of the challenged individual are such that his inclusion in the bargaining unit would be incompatible with collective bargaining. In the case of so-called "first line" managerial employees, the important question is whether the individual can fundamentally affect the economic lives of his fellow employees so that he is inevitably put in a position that creates a conflict of interest with them. The right to hire, fire, promote, demote or discipline employees are manifestations of managerial authority and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit...

[105] In the *City of Regina* case, *supra*, the Board was asked to consider whether the following positions were out-of-scope or within the CUPE bargaining unit: supervisor of the North West Leisure Centre, supervisor of the Southeast Leisure Centre, superintendent of open space services, superintendent of forestry and superintendent of parks. While RCMMA was an interested party in that case, it did not

participate in the proceedings and indicated it would only do so on a future application should any of the positions be determined by the Board to be out of the scope of the CUPE bargaining unit. The Board determined that all the disputed positions enumerated above, except the superintendent of parks, should be assigned to the CUPE bargaining unit, noting however that no decision was being made at that time regarding the issue of whether the duties and responsibilities of the superintendent of parks were sufficiently managerial such as to create a conflict of interest with employees in the RCMMA bargaining unit (i.e. that the duties and responsibilities would take the incumbent out of the definition of “employee” in the *Act* altogether), a matter which could later be determined should RCMMA decide to raise this issue on a subsequent application. In concluding that four of the named supervisor and superintendent positions should be within the CUPE bargaining unit, the Board acknowledged the important role of the incumbents in the maintenance of high quality programs and services and the importance of their input into decisions concerning staffing, planning and budgets. The Board reasoned as follows at 160:

The picture created by the evidence, however, is of employees who are important sources of information and whose expertise and knowledge is a valued commodity, rather than of persons whose positions are the site of truly independent decision-making authority in relation to matters which would have a direct and significant impact on the terms and conditions of employment of employees in the bargaining unit.

Like many persons in supervisory positions, the four incumbents play an important part in the daily direction of their staff, the planning and assignment of duties, routine disciplinary matters, and the selection of employees to fill vacancies. It is clear, however, that they play this role constrained by criteria and policies set elsewhere. Though their input is important because of their close familiarity with the needs and objectives of the units for which they have responsibility, the incumbents cannot be said to exercise actual decision-making authority when it comes to making decisions about hiring or significant disciplinary action; those decisions are made by senior managers and within the boundaries set by a standardized set of criteria developed and closely monitored by the Human Resources office.

[106] The Board in that case also noted that the incumbents’ role in planning and budgetary matters and in collective bargaining, was to gather and compile information and express their opinions, but not make the actual decisions. In addition,

the incumbents in those positions did not have “a high degree of confidence in their ability to make managerial decisions without the approval or involvement of someone senior to themselves.” The Board determined that their duties did not give rise to a conflict of interest between the interest of the employer and their fellow bargaining unit members that would lead the Board to conclude that the positions should be out-of-scope. The Board commented that the feeling of some of the incumbents in those positions that they experienced problems in the performance of their work as a result of their bargaining unit status “did not go beyond the awkwardness and discomfort which is experienced by many persons who must direct or admonish their fellow employees,” which was not a sufficient basis to conclude that there was a conflict of interest to the extent that would warrant exclusion from the bargaining unit.

[107] The Board determined that a distinction should be drawn in relation to the superintendent of parks position, in that certain aspects of the incumbent’s duties did create a conflict of interest justifying his removal from the CUPE bargaining unit. The Board concluded that the incumbent spent significantly more time than the others in relation to the selection, direction and discipline of staff, his hiring decisions were more independent, he was more confident of his authority to discipline and he was directly involved in negotiations with CUPE on behalf of the employer. The Board also commented that the distinction with the incumbent in this position was partly a function of scale in that because there were significantly more employees under his direction, he spent more time performing duties of a managerial character, “to the point where [the] position may ultimately involve “primarily” the performance of managerial functions, to use the terms of Section 2(f) of *The Trade Union Act*.”

[108] At the hearing of this matter, there was a significant amount of evidence led specifically in relation to the superintendent of asphalt however; we also heard some evidence in relation to the superintendent of concrete, primarily through Mr. Kovatch. Although on occasion the parties made it known that certain evidence they were providing would apply to both superintendent positions, it has become apparent to the Board that the totality of the evidence provided could be applied to both positions in order to make a determination regarding the appropriate placement of these positions, either out-of-scope, or in the CUPE or RCMMA bargaining units. The Board reaches

this conclusion based on that evidence of the parties, the nature of the restructuring, the nature of the operation of the roadways operations section, the inter-relationship of the positions, the origins of the positions, the wording of the job descriptions and the overlapping nature of the testimony regarding both positions. The same conclusion and analysis applies with respect to the four prior supervisor positions. Although each of the four positions tended to operate independently within the roadways operations section, it is clear through the testimony of the witnesses that the duties and responsibilities of the positions, as carried out by the incumbents, and the fact that the job descriptions are virtually identical, lend itself to the conclusion that the positions are essentially the same and that, for the most part, evidence in relation to one position applies to another.

[109] Applying the criteria to the facts of this case, the Board concludes that the duties and responsibilities actually exercised by the superintendents are not sufficiently managerial so as to create an insoluble conflict with the employees in the bargaining units. The Board concludes that the superintendent positions are employees within the meaning of s. 2(f) of the *Act*.

[110] In the present case before the Board, it appears that the impetus for a restructuring in the roadways and traffic division of the engineering and works department and specifically the roadways operations section, was the inefficiencies caused by the structure of that section. The old structure had four separate work areas: asphalt construction, asphalt maintenance, concrete construction and concrete maintenance, each operating under a supervisor who tended to focus on the operations of his or her particular work area, rather than on the “big picture” of the “construction business” of the City. The restructuring allowed the City to reduce the four work areas into two: asphalt and concrete, each operating under a superintendent who is now responsible for the maintenance and construction of his or her respective work area and for the coordination of work between those two work areas. Therefore, the real question becomes whether the duties and responsibilities of the superintendent positions changed to such an extent that they are different than the former supervisor positions and whether, because of that, the Board should consider that they ought to appropriately be placed out-of-scope.

[111] After a careful review of the evidence, including the witnesses' testimony and the documentary evidence, in particular the job descriptions, the Board concludes that the restructuring led to changes in the focus of the duties and responsibilities of the superintendent positions; however the duties and responsibilities of the positions have largely remained the same. The nature of the business of the City in this work area has not changed. It is through the amalgamation of the work areas and not a change in their powers or responsibilities that the superintendents have had the ability to effect the changes they have described. The City's organizational scheme (as it impacts on these positions) has largely remained the same and perhaps the only other occurrence that has assisted in causing these changes to actually come about is the appointment of a new roadways operations manager.

[112] A close examination of the evidence reveals that the superintendents do not fundamentally affect the economic lives of their fellow employees such that their inclusion in the bargaining unit would be incompatible with collective bargaining, at least no more so than when those individuals performed in the position of supervisor. The superintendents operate in a first line managerial capacity, being provided with some role in what are considered to be typical managerial or supervisory functions. With respect to their power to discipline, the evidence was quite consistent that both supervisors and superintendents have the ability to determine what action would give rise to discipline and, in the case of warnings and suspensions, would make what amounted to a recommendation as to the appropriate penalty. It was clear that the incumbents of these positions typically sought out the approval of their manager before any discipline was issued. In relation to terminations, the most significant form of discipline to affect employees, while they could make a recommendation, ultimate authority for the decision lay even beyond their out-of-scope manager. Also, the evidence indicated that the role performed by superintendents in relation to discipline was typical of in-scope supervisors in the CUPE bargaining unit.

[113] The superintendents also have a very limited role, if any, in their ability to affect labour relations. The superintendents are not involved in collective bargaining or the negotiation of any issues with the unions. The evidence indicates that their only role

with respect to having any economic effect on the employees they supervise is with respect to the assignment of work. The assignment of work is constrained by policies and criteria set elsewhere and, in particular, the terms of the existing collective agreement. This is not a different role than these employees previously played as supervisors. The anticipated impact of reducing employees' ability to work overtime actually resulted from the nature of the restructuring itself in that work areas were combined and operations were changed to the extent the employees were being better utilized in an attempt to reduce overtime costs. These operational changes, while they may have been initiated or created by the superintendents, were not their independent decisions. The picture created by the evidence is that the superintendents would propose changes to their manager and the engineer and possibly human resources or other affected personnel, who would all have to agree before the superintendent could implement a change. Again, this is largely the same process followed by the former supervisors but for the impediments to making changes that existed in the prior structure of having four independently operating work areas operating in an environment that did not permit or allow changes to be made very easily. The same conclusion applies with respect to any changes or decisions that were made to the shifts of employees. The superintendents' involvement in long term or strategic planning alone does not put them in a labour relations conflict with bargaining unit employees, where those decision are not made independently by them. Although it appears that more recently there is a committee titled the section management team and that the superintendents participate in those meetings, it does not appear that the superintendents are making independent decisions but rather the City is using a "team" approach to decision-making where high regard is given to the superintendents' recommendations because of their knowledge of front-line work activities. It is apparent that the superintendents require the approval of that team before making any changes. That does not diminish the role of the superintendents on that team because, as stated by Mr. Wandzura, the City wanted front-line personnel in these positions because it was important that those involved in making the decisions are the ones actually doing the work.

[114] The evidence indicates that there may be some slight differences in the way that grievances are handled by the superintendents over how they were handled as

supervisors. There was some evidence, although it was inconsistent between those superintendents who dealt with grievances as part of their duties, that the superintendents were more involved in the presentation of the grievance and interpreting and applying the collective agreement. We fail to see how interpreting and applying the collective agreement is different from what the supervisors described as determining, for example, how to assign work pursuant to the seniority provision or what type of discipline to recommend. Similarly, justifying their position to management for taking any action they have taken as a supervisor appears little different from being accountable for their decisions and making justifications for their actions when they are a superintendent. Although one of the witnesses who performed the superintendent's position indicated that he was more involved in the presentation of a grievance on behalf of management, it is unclear what he meant by that and, in any event, the response to the grievance was decided by his manager. It does not appear that the collective agreement was changed to specifically make the superintendent a part of the grievance procedure responding on behalf of management. It is the Board's impression of the evidence that the role played by the superintendents in the grievance process does not create a conflict with the bargaining unit employees they supervise.

[115] It is also clear on the evidence that the superintendents' role in budgeting is a very limited one and not sufficient to conclude that their role has an economic impact on fellow employees resulting in a conflict of interest. They are limited to providing input and making recommendations. The actual preparation of the budget is done and the decisions as to what goes into the budget are made by the manager and engineer with support from personnel in financial administration. The actual budget must ultimately be approved by City Council. Mr. Wandzura indicated that the City hopes that the superintendents will become involved in actual budget preparation but that that is one example of the areas where the goal of the City for the position has not quite been met.

[116] With respect to the authority to hire, the evidence is somewhat contradictory in terms of who actually makes those decisions. The decision to hire employees generally appears to be one of those operational issues that requires the agreement of the manager. The decision of who specifically to hire at least involves

human resources and, in some cases, the manager is part of the decision-making. It therefore appears that the decision to hire is not a truly independent function of a superintendent. In any event, the ability to hire is considered more of a secondary function in the assessment of whether a position should be out-of-scope and therefore is not determinative of the matter.

[117] Other duties exercised by the superintendents such as directing the workforce, training staff, assigning work, scheduling and approving leaves are supervisory functions that do not typically, and not in the context of this case, give rise to a conflict of interest such that the relationship between a union and management would be undermined if the person were in a bargaining unit. The evidence indicated that these are also functions commonly performed by the four former supervisors as well as typical supervisors in the CUPE bargaining unit and, to some extent, individuals in the RCMMA bargaining unit.

[118] When examining the factors outlined above, the Board notes that, in many cases, powers and responsibilities that are of a supervisory or managerial nature have also been performed by the supervisors whose positions were deleted. It is apparent from the evidence that those supervisors exercised these responsibilities for quite some time without any prior challenge to their inclusion in the CUPE bargaining unit. As well, the evidence of Mr. Ullrich illustrated that, in carrying out his duties and responsibilities as the supervisor of sewage collection, which position is in the CUPE bargaining unit, he exercises the same degree of supervisory or managerial duties as the superintendents. Therefore, while the exercise of any of these duties or responsibilities by the supervisors may tend to *appear* to “cross the line” and be more closely associated with those of an out-of-scope position, they have not in actuality caused a conflict of interest. The supervisors have not faced any repercussions for the roles they have played in discipline and grievance handling and, for the most part, they do not view themselves in conflict with the members of the CUPE bargaining unit who they supervise.

[119] The Board finds that the analysis used by the Board in the 1994 *City of Regina* case, *supra*, relating to the supervisor and superintendent positions under consideration in that case, helpful and the reasons for not excluding many of those positions directly applicable to this case. Those that were found to be in-scope were said to be “important sources of information ...whose expertise and knowledge a valued commodity, rather than of persons whose positions are the site of truly independent decision-making authority.” The Board indicated that the incumbents of those positions were important in terms of their direction of staff, the planning and assignment of duties, the imposition of routine discipline and the hiring of employees, although their role “was constrained by criteria and policies set elsewhere,” noting also that the true authority for decisions about hiring and disciplinary action lay with management guided by human resources. In the present case the Board has determined that the superintendent positions are more comparable to the positions declared in-scope in that case, rather than the one position declared out-of-scope by that panel of the Board. With reference to the actual job duties and even the position description, the role of the superintendent is to make recommendations regarding changes to operations and to policies and procedures, and regarding staff selection and corrective discipline. In addition, the superintendent’s actions are constrained by use of such terms in the position description, as “in accordance with standard methods and procedures,” “within limits of established authority,” “within prescribed procedures and methods,” and “within established priorities and standards.” In our view, even though the number of employees to be supervised by a superintendent increased following the restructuring, the superintendents under consideration here do not spend so much of their time in relation to staff selection, discipline and direction to staff that they are “primarily” performing functions of a managerial character. Their decision-making is not sufficiently independent nor are they involved in any negotiations with a union such that they should be treated like the superintendent in that case whose position was placed out-of-scope.

[120] The City argued that CUPE’s agreement to transfer the superintendent of open space services out-of-scope should be considered in determining that these positions, also superintendents with similar job descriptions, are out-of-scope. This agreement is viewed by the Board as an anomaly and limited to the circumstances

around that position, including the fact that it was negotiated between the parties with CUPE considering that the incumbent wanted to be out-of-scope and that it could obtain three positions in its bargaining unit by making the agreement. The letter was not intended to serve as a precedent and CUPE was not able to review and agree to the job description for the position, having received it only after CUPE entered into the letter of understanding. In addition, the fact that there are other positions titled “superintendent” out of the scope of the CUPE bargaining unit is not determinative. The actual duties and responsibilities performed by the incumbents in those positions is of much greater importance, however, no such evidence was provided to the Board.

[121] Mr. Wandzura frankly admitted that in terms of the superintendent positions that the superintendents are not performing all the duties of their positions and not performing at the level set by the City’s plans for these positions. While the Board makes no ruling as to whether the ultimate vision of the City for these positions would in fact result in changes of a degree sufficient to place them out-of-scope, the Board has concluded that the superintendents, whether by reference to their position descriptions or their actual performance, do not exercise managerial or supervisory authority to the extent that they should be placed out-of-scope.

[122] It was noted at the outset of these Reasons that RCMMA raised as a preliminary matter the issue of whether the City should be permitted to take the position in its s. 5(m) application that the superintendent positions should be placed out-of-scope when it actually placed the positions in the RCMMA bargaining unit and claimed, in the context of CUPE’s unfair labour practice application, that the positions were properly placed in the RCMMA bargaining unit. In the context of these types of determination applications, it is the Board’s opinion that it should always take into account the consideration that a position might not belong in either bargaining unit. While the City’s approach to the issue (its inconsistent pleadings) is not a desirable one, particularly given its reasons for changing its position, the applications and replies nevertheless placed the proper issue before the Board for consideration. That said, and considering the determination that the positions in question are “employees” within the meaning of the *Act*, it is not necessary for the Board to make a specific finding as to whether the City

should be permitted to have inconsistent pleadings or whether an amendment to its earlier reply should be granted.

[123] Having concluded that the superintendent of concrete and the superintendent of asphalt are employees within the meaning of the *Act*, the Board must decide whether the positions should be assigned to the CUPE bargaining unit or the RCMMA bargaining unit. With regard to the placement of these positions, the Board must decide where to draw the line between these two units. The Board has rendered a number of decisions where it has been asked to make a determination on the appropriate placement of a position in a workplace with multiple bargaining units, namely in the workplaces of the University of Saskatchewan and in the cities of Regina and Saskatoon. Although the appropriate test appears to be somewhat different in each of those workplaces, it is helpful to a determination of this application to examine the evolution of that case law.

[124] In *City of Saskatoon, supra*, the Board indicated that the primary concern was to ensure that the multiplicity of bargaining units did not result in industrial instability. On the other hand, in the 1994 decision involving the *Regina Professional Fire Fighters and the City of Regina, supra*, the Board stated that factors such as industrial stability and viability of the bargaining unit are not particularly helpful to the inquiry, preferring instead to consider such factors as community of interest, lateral mobility for the incumbent in the disputed position, and the similarity of the disputed position to other positions in the two bargaining units.

[125] In the *City of Saskatoon* decision, *supra*, the Board attempted to establish criteria for the assessment of whether a position should be assigned to CUPE or SCMMA and indicated a preference for larger, more inclusive units and a restrictive approach to defining the scope of a smaller, more specialized unit at 330:

We start with the observation that this Board, along with other labour relations boards in Canada, generally prefers large units, including as many employees as possible, to small specialized craft or other units. In Hospital Employees' Union, Local 180 v. Health Sciences Association of British Columbia and Kelowna Hospital Society, [1977] 2 Can. L.R.B.R. 58, the British Columbia Labour Relations Board expressed the labour relations policy reasons for favouring large all employee units in the following terms, at 67:

The first is the long-standing policy in favour of large industrial units, units covering as many employees as possible. This policy, which is designed to promote industrial stability, administrative efficiency, and common frameworks of employee conditions, has particular force in the public sector . . . Special features must be present to warrant a departure from this norm. In hitherto unorganized sectors of the economy, an exception will be permitted where to insist on the norm would be to effectively deny collective bargaining . . . In other instances, exceptions have been permitted on the basis of s. 41 of the Code or powerful historical or like factors.

Flowing from this preference for large bargaining units, when faced with multiple bargaining units, the Board will take a fairly restrictive approach to defining the scope of the smaller, specialized unit. In the Kelowna Hospital case, supra, the British Columbia Labour Relations Board adopted this restrictive approach and explained its rationale, at 68:

Where two (or more) bargaining units have been established in any undertaking, the first a large industrial unit and the other a smaller craft or special group unit, the boundaries of the latter should be defined or developed with a relatively restrictive frame of mind. There are at least two reasons for adopting that approach. First, to give sanction to a more expansionist view in favour of the smaller unit would be to further dilute the general policy in favour of single industrial units. The smaller, special characteristic unit will have been created to meet particular and compelling circumstances not to give the trade union a beachhead from which it can make further inroads into the larger units and the overriding policy. Secondly, the relatively restrictive state of mind will in many cases be necessary to avoid denuding the industrial or service

unit of a significant element of its viability and bargaining strength. When the smaller, exceptional unit is created it frequently creams off and takes into membership the most skilled employees. The unit, although relatively small, derives its bargaining strength from the fact that it contains such skilled persons - persons quite essential even in the short run to the continued operation of the employer. The industrial unit, although larger, will generally contain a number of persons who are not essential in the short run to the employer's operations. Sheer size will be one measure of the bargaining strength of the larger unit. But another measure, often equally significant, will be the extent to which the industrial or service unit includes technical or skilled employees.

This approach was approved by the Board in Regina Civic Middle Management Association v. City of Regina and City Hall Administrative Staff Association, Local No. 7, C.U.P.E. and Civic Employees' Union, Local 21, C.U.P.E., [1980] 3 Can. L.R.B.R. 390, LRB File Nos. 298-79 & 314-79.

[126] Also in the *City of Saskatoon* decision, *supra*, the Board continued by discussing the evolution of the middle management units at the cities of Regina and Saskatoon and the importance of using a conflict of interest test, absent the position having some peculiar historical reason for being excluded from the larger unit, at 331:

In Saskatoon and Regina, the middle management units were formed from the employees who were excluded by Board Order or by agreement from the large, all employee units, which generally include an outside workers unit, inside workers unit, transit unit, and a fire fighters unit. Special units may also exist in city owned utilities, such as the IBEW unit in the City. Although there may be some historical anomalies that explain the exclusion of some of the positions from the larger industrial units, generally, the exclusions came about because of the potential for a labour relations conflict with membership in the industrial unit arising out of the managerial duties performed by management personnel and because of the close alignment of middle management personnel with decision-making processes that may affect the larger industrial units. In the public sector, it is not unusual to have several layers of management in which the lowest level do not exercise sufficient managerial authority to remove them from the definition of "employee", although their community of interest

lies closer to the managerial suite than to the industrial bargaining units.

In these situations, the Board has approved the creation of middle management units. In doing so, however, the Board has defined the middle management unit in a restrictive fashion by confining its membership to those positions who, if they were included in a large industrial unit, would be placed in a conflict of interest situation between their obligations to perform supervisory and first rung management functions in relation to those employees and their membership in the larger unit. The Board has also allowed positions to be included in middle management units which have some peculiar historical reason for being excluded from the industrial bargaining unit. However, these positions are not permitted to be used as a springboard for organizing other positions that otherwise would be included in the larger industrial unit.

In relation to defining the community of interest that must be shared by persons assigned to the middle management unit, the Board will focus on the labour relations aspects of their positions. The professional or other status required by the position will not be considered a determining factor, unless the position is one that for historical reasons was included in the middle management unit, or excluded from the industrial unit. This is consistent with the Board's previous decision in City of Regina v. Canadian Union of Public Employees, Local 7 and Regina Civic Middle Management Association, [1986] Sept. Sask. Labour Rep. 69, LRB File Nos. 387-85, 389-85, 031-86 & 032-86 where the Board considered the position of Research and Planning Analysts in the Parks and Recreation Department of the City of Regina and held as follows, at - 70:

. . . after considering all of the circumstances the Board has decided that they ought properly to fall within the bargaining unit represented by the Canadian Union of Public Employees, Local 7. The Board views the Regina Civic Middle Management Association as representative of employees in "middle management" positions, and in its opinion the Analysts do not perform duties of a sufficiently managerial character to warrant placing them in that Association.

[127] In the 1994 decision involving the *Regina Professional Fire Fighters and the City of Regina*, *supra*, at 171, the Board referred to evidence given by a witness in that case, whose observation the Board agrees with and is illustrative of a historical anomaly in the circumstances of this case:

Mr. Mike Whiting, the President of the Regina Civic Middle Management Association, described the general nature of the positions in the bargaining unit represented by his union. Although at one time the positions within the bargaining unit were characterized more exclusively in terms of managerial or supervisory responsibilities of some sort, he stated that the character of the unit has changed somewhat in recent years. This is largely due to the inclusion in the unit of a significant number of employees who work in the computer and information systems areas. These employees do not generally have responsibilities which are managerial or supervisory; their positions are, however, characterized by a high degree of autonomy and an expectation that they will exercise independent professional judgment within their sphere of professional expertise.

[128] In *Canadian Union of Public Employees, Local 21 v. City of Regina; Regina Civic Middle Management Association v. City of Regina*, [1998] Sask. L.R.B.R. 464, LRB File Nos. 023-95 & 037-96, which post-dates the *City of Saskatoon* decision, *supra*, by six weeks, the Board carefully reviewed and characterized the analysis used for assigning positions as (i) between CUPE and the SCMMA at the City of Saskatoon as a modified conflict of interest test (defining community of interest by focusing on its labour relations aspects), and (ii) between CUPE and the RCMMA at the City of Regina as a “community of interest test in broader terms.” The Board stated at 474:

In recent decisions involving the middle management bargaining unit at the City of Saskatoon, the Board adopted a modified conflict of interest test to determine if employees should be assigned to the middle management unit. In City of Saskatoon v. Canadian Union of Public Employees, Local 59 and Saskatoon Civic Middle Management Association, [1998] Sask. L.R.B.R. 321, LRB File No. 232-97, the Board set out the test in the following terms:

In these situations, the Board has approved the creation of middle management units. In doing so, however, the Board has defined the middle management unit in a restrictive fashion by confining its membership to those positions who, if they were included in a large industrial unit, would be placed in a conflict of interest situation between their obligations to perform supervisory and first rung management functions in relation to those employees and their membership in the larger unit. The Board has also allowed positions to be included in middle management units which have some peculiar historical reason for being excluded from the industrial bargaining unit. However, these positions are not permitted to be used as a springboard for organizing other positions that otherwise would be included in the larger industrial unit.

In relation to defining the community of interest that must be shared by persons assigned to the middle management unit, the Board will focus on the labour relations aspects of their positions. The professional or other status required by the position will not be considered a determining factor, unless the position is one that for historical reasons was included in the middle management unit, or excluded from the industrial unit. This is consistent with the Board's previous decision in City of Regina v. Canadian Union of Public Employees, Local 7 and Regina Civic Middle Management Association, [1986] Sept. Sask. Labour Rep. 69, LRB File Nos. 387-85, 389-85, 031-86 & 032-86 where the Board considered the position of Research and Planning Analysts in the Parks and Recreation Department of the City of Regina and held as follows, at -70:

. . . after considering all of the circumstances the Board has decided that they ought properly to fall within the bargaining unit represented by the Canadian Union of Public Employees, Local 7. The Board views the Regina Civic Middle Management Association as representative of employees in "middle management" positions, and in its opinion the Analysts do not perform duties of a sufficiently managerial character to warrant placing them in that Association.

In the City of Regina decision (LRB File Nos. 202-94 and 226-94), supra, the Board considered the community of interest test in broader terms as indicated as follows, at 169 & 170:

Under these conditions, other factors come to the fore which might not be as significant in another context. Among these are community of interest, lateral mobility for the incumbent of the position, and the similarity of this position to other positions in the two bargaining units in which it has been proposed to include the position.

In that instance, the Board assigned the position of computer and financial systems co-ordinator to the middle management unit based on the factors listed above. The Board did not address the question whether the responsibilities of the position placed the incumbent in a conflict of interest situation with members of the firefighters' bargaining unit. In the second City of Regina case (LRB File No. 268-94), supra, the Board considered the status of five persons in superintendent and supervisory positions and, based on a conflict of interests test, determined that four of the five positions were properly assigned to the CUPE bargaining unit.

We make reference to the earlier decisions of the Board dealing with the assignment of positions between CUPE and RCMMA to demonstrate the somewhat inconsistent approach taken by the Board when determining whether particular positions should be assigned to the middle management unit or one of the other broader bargaining units. As a result, the middle management unit in the City of Regina has evolved in a fashion that is somewhat incoherent. The positions assigned to RCMMA run the gamut from professional occupations, such as engineering and architecture, to computer analyst positions and to the various levels of middle managers, including co-ordinators, supervisors and managers. Clearly, not all of the positions assigned to RCMMA would meet the conflict of interest test set out in the City of Saskatoon case, supra.

[129] In the 1994 decision involving the *Regina Professional Firefighters Association and the City of Regina*, supra, the Board discussed the factors to consider in the assessment of “community of interest” with positions in each of the competing unions. They include the required educational qualifications and the general nature of the duties performed by the incumbent. As stated, in addition to community of interest, the Board also analyzed whether the career outlook would be more favourable for the

incumbent in one unit or the other, lateral mobility and the similarity of the position to those in one or the other of the competing bargaining units.

[130] These previous Board decisions guide us in the proper approach to use in determining to which bargaining unit, in this multiple bargaining unit setting at the City of Regina, the superintendent positions should be assigned. There is a presumption that the positions belong in the broader, more inclusive bargaining unit unless they are not “employees” within the meaning of the *Act*, or there is a conflict of interest which necessitates their removal from the broader, more inclusive unit. If the person is not an “employee,” the position is declared to be out-of-scope of any bargaining unit. If the person is an employee but is in a conflict of interest with members of the broader, more inclusive unit, the employee must be assigned to a different bargaining unit. If there is no conflict of interest with the larger unit, the employee may still be assigned outside the larger unit on a broader community of interest test or because of a historical anomaly.

[131] We therefore start with the proposition that the superintendent positions belong in the broader, more inclusive unit, which in this case, is CUPE. The Board has concluded that the superintendents are employees within the meaning of the *Act*. For the reasons previously discussed, the Board has also determined that there is no conflict of interest between the superintendents and CUPE bargaining unit members, in the particular circumstances of this case, which necessitates their removal from the CUPE bargaining unit. In addition to our earlier comments and analysis in this regard, a close examination of the evidence of all the superintendents indicates that they feel they would not be prevented from carrying out their required duties and responsibilities if they were in the same bargaining unit as their fellow employees. Only a couple of witnesses perceived that they might feel somewhat conflicted when having to implement changes in operations. The Board views these perceptions of discomfort as not out of the ordinary for in-scope supervisory personnel and not a sufficient basis to conclude that a conflict of interest exists between them and the CUPE members they supervise. Although they do, in fact, carry out functions of a first line managerial nature, as referred to in some of the cases cited, which might provide a reason to place them in the RCMMA bargaining unit, those types of functions have not been the exclusive domain of

the RCMMA bargaining unit. There have been supervisors in the CUPE bargaining unit who have also carried out these functions for a number of years and, as such, the test of whether there is actual conflict is of greater importance in this assessment than the mere statement that they carry out functions of this nature. As stated the Board finds that no such conflict exists.

[132] The question we are therefore left with is whether these positions should be removed from the CUPE bargaining unit on the basis of a broader community of interest test or for historical reasons. The line between these bargaining units is a difficult one to delineate and, as stated in other Board decisions, it is somewhat incoherent.

[133] While historical anomalies might provide a basis for placement of a position in a middle management unit, on the evidence before the Board, there is no unusual historical basis for placing these positions in the RCMMA bargaining unit. It is on the basis of the broader community of interest test that we conclude that these positions are most appropriately placed in the CUPE bargaining unit.

[134] In assessing community of interest, we are guided by a number of factors including educational qualifications, the general nature of the duties performed, lateral mobility, and the similarity of the positions to those in one of the competing bargaining units. Different cases have placed a different emphasis on each of these factors, as the circumstances require. For the purposes of this case, the most determinative factor is the similarity of the positions to positions in one of the competing bargaining units, however, we will examine each in turn.

[135] The stated educational qualifications are higher than what was expected in the supervisor positions, however, neither of the initial incumbents had the required educational qualifications. The experience required for these positions seems somewhat lower than what it was for the supervisors, however, it would seem to come directly from working in the roadways operations section as a member of CUPE. Based on the evidence at the hearing, RCMMA positions tend to require a higher level of

education (*ie.* a university degree) than required for these superintendent positions. On balance, this factor weighs in favour of the positions being placed in the CUPE bargaining unit.

[136] Lateral mobility as a determinative factor is of somewhat limited value here as there would be limited mobility in either bargaining unit. The incumbents obtained their positions as a result of their front-line experience, their skills and abilities obtained in the supervisor position and having in most cases worked their way up through the ranks over many years, gaining intimate knowledge of the roadways operations. This very confined experience, along with their limited formal education, would not appear to qualify them for other positions in the RCMMA bargaining unit, on the basis of the evidence at the hearing. Their lateral mobility appears to be limited to either the other superintendent position or an out-of-scope position, and therefore they are more closely aligned with the CUPE bargaining unit than the RCMMA bargaining unit.

[137] The general nature of the duties performed might be the least helpful factor. While they now play an important role in the planning and decision-making in their area, it is apparent from the position description and witnesses' testimony that the superintendents still fulfill a front-line role in the field. They remain closely aligned and involved in the work in the same manner as when they were in the supervisor position, by being responsible for the scheduling, assignment and direction of staff and programs, rather than performing mostly managerial duties or duties of a technical or consultative nature. The Board also concludes from the fact that the City's overall plan is to eliminate the assistant superintendent positions, that they are basically fulfilling the role of supervisor albeit for two areas now instead of one.

[138] In relation to the broader community of interest test, the most important factor in this case involves determining with which unit there are more similarities in positions. On a whole, the Board has determined that the positions are far more similar to the former supervisor positions in CUPE than any of the positions the RCMMA offered in evidence. As part of our analysis we are required to trace back the duties and

responsibilities of these positions to either of the bargaining units. In the Board's view it is very clear that these positions devolved primarily from the supervisor positions which were in the CUPE bargaining unit. The Board has closely reviewed the position descriptions of the superintendent and supervisor positions and, while there are definite wording changes, the Board sees little difference between them in terms of substance and certainly, when considering the evidence as a whole in relation to the actual performance of their duties and responsibilities, there is very little difference between the positions in actual practice. The types of decisions they make with their managers, the fact that there have been significant operational changes which they are responsible to implement and the fact that they are responsible for a greater number of employees than when they were a supervisor, results in our view from the restructuring and not any significant and substantive change in the positions. While there may be a greater emphasis on planning and the superintendents obviously have greater input into decisions, it is the climate for change created by the City and the combining of work areas for improved functionality of their "construction business" that resulted in this. The core functions of the superintendent positions have not changed such that the positions ought to be outside the scope of the larger, more inclusive unit and placed in the RCMMA unit.

[139] The City had a plan that the superintendents would be operating on a higher level, that they would be part of the management team and making independent managerial decisions. While there is some evidence of increased responsibility which the Board has determined is not sufficient to declare the positions outside the scope of the CUPE bargaining unit, even the City's evidence was that its plan has not been fully implemented, in that the superintendents are not yet operating at the level the City had planned. In the words of Mr. Wandzura, "they're not quite there yet" and the City cannot expect these former supervisors to change overnight in terms of their thinking and their culture. As at the date of the last hearing, the incumbents had been functioning in the superintendent positions for some 20 months and, while it is possible that their positions may evolve to such an extent that the analysis herein becomes inapplicable, in the Board's view, the window of operation has been sufficiently long to allow us to have a reasonably good idea of the extent to which these positions will function. A provisional

order pursuant to s. 5(m) of the *Act* is often made in relation to newly created positions where the incumbents have yet to be appointed or have been functioning in the position in question for a very short period of time. However, it would also apply to circumstances such as these, where the employer claims that the position has not evolved to the point where it reflects the final duties and responsibilities expected of the incumbent.

[140] It is for these reasons that the Board has determined that the superintendent of asphalt and the superintendent of concrete are employees and should be assigned to the CUPE bargaining unit on a provisional basis pursuant to s. 5.2 of the *Act*. The order of the Board shall become final within one year unless a further order is made upon an application to vary.

DATED at Regina, Saskatchewan, this **26th** day of **July, 2005**.

LABOUR RELATIONS BOARD

Angela Zborosky, Vice-Chairperson